88-1440

No. ____

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

RONALD and FRANCES GAJKOWSKI, ROBERT SCHIPSKE and WILLIAM and JEAN ABATE,

Petitioners

vs.

HIGHWAY TRUCK DRIVERS and HELPERS LOCAL UNION NO. 107,

Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE PENNSYLVANIA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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131 pp

QUESTION PRESENTED

Whether the violation by the Pennsylvania Supreme Court of its own rules, in granting a second, untimely petition for rehearing and reversing its prior final judgment for money damages only on the basis of a change in legal interpretation, was so arbitrary that it deprived the judgment holders of their property without due process of law?

PARTIES TO PROCEEDING

Parties in interest in this appeal are those named in the caption of this Petition.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
PARTIES TO PROCEEDING	i
TABLE OF AUTHORITIES	iii
OPINIONS BELOW	vi
JURISDICTIONAL STATEMENT	vi
CONSTITUTIONAL AND STATUTORY PROVISIONS	vii
STATEMENT OF THE CASE	1
REASONS FOR GRANTING THE WRIT	4
CONCLUSION	11
APPENDIX	12

TABLE OF AUTHORITIES

CASES:	Page
Allen v. McCurry, 449 U.S. 90, 101 S.Ct. 411 (1980)	10
Arizona v. California, 460 U.S. 619, 103 S.Ct. 1382 (1983)	10
Association of St. Croix Condominium v. St. Croix Hotel, 682 F.2d 446 (3d Cir. 1982)	2
Bello v. Walker, 840 F.2d 1124 (3d Cir. 1988)	6
Board of Regents of State Colleges v. Roth, 408 U.S. 564, 92 S.Ct. 2701 (1972)	4
Cahill v. New York, New Haven & Hartford R.Co., 351 U.S. 183, 76 S.Ct. 758 (1956)	8, 9
Chicago, Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897)	4
Commonwealth v. Blair, 470 Pa. 598, 369 A.2d 1153 (1979)	6
Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973)	6
Daniels v. Williams, 474 U.S. 327, 106 S.Ct. 662 (1986)	5
Demorest v. City Bank Co., 321 U.S. 36, 64 S.Ct. 384 (1944)	6
Dozer v. Rosenberg, 431 Pa. 311, 246 A.2d 330 (1968)	7
Estate of Ciaffoni, 498 Pa. 267, 446 A.2d 225 (1982)	7
Evans v. City of Chicago, 689 F.2d 1286 (7th Cir. 1982)	5
Gajkowski v. International Brotherhood of Teamsters, etc., 515 Pa. 516, 530 A.2d 853 (1987); *withdrawn*, _Pa. __, 548 A.2d 533 (1988)	3,5,10

Table of Authorities (Continued)

	Page
Gondeck v. Pan American World Airways, Inc., 382 U.S. 25, 86 S.Ct. 153 (1965)	9, 10
Greyhound Food Management, Inc., v. City of Dayton, 653 F.Supp. 1207 (S.D. Ohio 1986)	5
Hammond v. United States, 786 F.2d 8 (lst Cir. 1986)	5
In re Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982 (9th Cir. 1987)	5
In re Meade Land & Development Co., 1 B.R. 279 (Bankr. E.D. Pa. 1979)	5
Ladner v. Siegel, 298 Pa. 487, 148 A. 699 (1930)	4
Luskey v. Steffron, 469 Pa. 377, 366 A.2d 223 (1976)	6
McDonald v. Board of Mississippi Levee Commissioners, 646 F.Supp. 449 (N.D. Miss. 1986), *affirmed*, 832 F.2d 901 (5th Cir. 1987)	6
O'Neil v. No. Colorado Irrigation Co., 242 U.S. 20, 37 S.Ct. 78 (1916)	6
Parratt v. Taylor, 451 U.S. 527, 101 S. Ct. 1908 (1981)	6
Pennsylvania Co., etc., v. Scott, 346 Pa. 13, 29 A.2d 328 (1942)	4
Roberts v. City of New York, 295 U.S. 264, 55 S.Ct. 689 (1935)	6
Thompson v. Louisville, 362 U.S. 199, 80 S.Ct. 624 (1960)	6
Tradesmen's National Bank & Trust Co. v. Floyd, 156 Pa. Super. 141, 39 A.2d 728 (1944)	4

Table of Authorities (Continued)

	Page
United States v. Ohio Power Co., 353 U.S. 98, 77 S.Ct. 652 (1957)	9
Weed v. Bilbrey, 400 U.S. 982, 91 S.Ct. 361 (1970)	10
Winn v. TWA, 506 Pa. 138, 484 A.2d 392 (1984); *appeal dismissed*, 515 A.2d 303 (1986)	7
Wolff v. McDonnell, 418 U.S. 539, 94 S.Ct. 2963 (1974)	5
CONSTITUTIONAL PROVISIONS:	
U.S. Constitution, Amendment XIV	6
STATUTES AND RULES:	
11 U.S.C. Sec. 362(a)	2
28 U.S.C. Sec. 1738	3, 8
Rule 60, Federal Rules of Civil Procedure	8
Rule 105(a), Pennsylvania Rules of Appellate Procedure	7
Rule 2542(a), Pennsylvania Rules of Appellate Procedure	2
Rule 2547, Pennsylvania Rules of Appellate Procedure	2
OTHER:	
Restatement (Second) Judgments	8

OPINIONS BELOW

The first opinion of the Pennsylvania Supreme Court is reported at 515 Pa. 516, 530 A.2d 853 (1987). The Court's second opinion in this case is reported at __ Pa. __, 548 A.2d 533 (1988). The opinion of the Superior Court of Pennsylvania is found at 350 Pa. Super. 285, 504 A.2d 840 (1986). The Bucks County Court of Common Pleas panel opinion is reported at 45 Bucks Co. L.Rep. 109 (1984). All of these opinions are reprinted in the Appendix.

JURISDICTIONAL STATEMENT

The second judgment of the Pennsylvania Supreme Court, of which petitioners are seeking review, was entered on September 28, 1988. Petitioners filed a timely petition for rehearing, which was denied by Order of the Pennsylvania Supreme Court entered December 1, 1988.

This Court has jurisdiction to review the judgment of the Pennsylvania Supreme Court by writ of certiorari, pursuant to 28 U.S.C. §1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS

United States Constitution, Amendment XIV, Sec. 1:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

11 U.S.C. §362(a) Automatic Stay:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302 or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of:
>
> (1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;
>
> (2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;
>
> (3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;
>
> (4) any act to create, perfect, or enforce any lien against property of the estate;
>
> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

Constitutional and Statutory Provisions (Continued)

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

Rule 105(a), Pennsylvania Rules of Appellate Procedure:

(a) Liberal Construction and Modification of Rules. These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every matter to which they are applicable. In the interest of expediting decision, or for other good cause shown, an appellate court may, except as otherwise provided in Subdivision (b) of this rule, disregard the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

Rule 2542(a), Pennsylvania Rules of Appellate Procedure:

Time For Application For Reargument; Manner of Filing

(a) Time. An application for reargument shall be filed with the Prothonotary within 14 days after entry of the judgment or other order involved.

Rule 2547, Pennsylvania Rules of Appellate Procedure:

Subsequent and Untimely Applications

Second or subsequent applications for reargument, and applications for reargument which are out of time under these rules, will not be received.

STATEMENT OF THE CASE

On January 25, 1980, petitioners[1] Ronald Gajkowski, William Abate and Robert Schipske were shot on a picket line maintained by the Highway Truck Drivers and Helpers Local Union No. 107 (hereinafter "Local 107") and its parent organization, the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "IBT"), at the Minnesota Mining and Manufacturing Co. (hereinafter "3M") plant in Bristol, Pennsylvania. At the time of the shooting, Gajkowski, Abate and Schipske were employees of 3M and Gajkowski and Schipske were members of Local 107 and the IBT.

Ronald Gajkowski was shot in the side of the head and had to have his left eye removed. William Abate was shot in the throat and suffered severe internal injuries. Robert Schipske was shot across the nose. The shots were fired by Robert Ballinger, a member of Local 107. Ballinger was given the gun by Robert Kendig, a union steward, following an afternoon of drinking by the two, along with William Crossan, Local 107's chief steward and a member of its negotiating committee.

In June, 1980, Gajkowski, Abate and Schipske each filed a complaint in trespass in the Court of Common Pleas of Bucks County against Local 107 and the IBT for their negligent maintenance of the 3M picket line and for their direct participation in the events which resulted in plaintiffs' injuries. The spouses of Ronald Gajkowski and William Abate joined in the actions which were later consolidated. Their claims were tried to a jury which returned a verdict in favor of all plaintiffs against both defendants and assessed damages totalling 1.3 million dollars.

Defendants' post-trial motions were argued before a three-judge panel of the Court of Common Pleas of Bucks County. The panel denied the motions by opinion and order dated September 5, 1984. Defendants appealed to the Pennsylvania Superior Court, which on January 28, 1986 reversed the panel's decision and ordered the entry of judgment n.o.v. in favor of both defendants.

The Pennsylvania Supreme Court allowed plaintiffs' appeal, and on August 31, 1987, issued a judgment and opinion reversing, by a 4-3 vote, the

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[1] For the Court's convenience and clarity, petitioners, who were plaintiffs in the trial court, will sometimes be referred to herein as "plaintiffs." Likewise, respondent will sometimes be referred to as "defendant."

Superior Court's ruling as to Local 107, and affirming it as to the IBT. Thus, the $1.3 million jury award was reinstated as against Local 107. On September 14, 1987, Local 107 filed an application for reargument pursuant to Rule 2542 of the Pennsylvania Rules of Appellate Procedure. This application was denied by the Court on October 9, 1987, thereby rendering final the judgment entered against Local 107.

In light of the final judgment in that matter, and to avoid execution thereon by the plaintiffs, Local 107 voluntarily filed for relief under Chapter 11 in the Bankruptcy Court for the Eastern District of Pennsylvania on October 16, 1987. The filing invoked the automatic stay provisions of 11 U.S.C. §362(a), thereby precluding the plaintiffs from executing on their final judgment. Under the law in the Third Circuit, the automatic stay also precluded Local 107 from proceeding further in any appeal. *Association of St. Croix Condominium v. St. Croix Hotel*, 682 F.2d 446, 448-49 (3d Cir. 1982).

Notwithstanding the express proscriptions of the bankruptcy automatic stay and of Rule 2547 of the Pennsylvania Rules of Appellate Procedure, which provides that "second or subsequent applications for reargument . . . will not be received," on November 2, 1987, Local 107 filed a *second* application for reargument styled "Application for Reconsideration Nunc Pro Tunc of the Denial of Local 107's Application for Reargument." The second application alleged neither fraud nor newly discovered evidence as a ground for reargument. Despite the apparent impropriety of Local 107's second application for reargument under both the federal bankruptcy laws and the Rules of Appellate Procedure of Pennsylvania, on November 18, 1987, the Pennsylvania Supreme Court granted the application, without explanation, and scheduled reargument for April 12, 1988.

On March 14, 1988, Local 107 for the first time sought relief, *nunc pro tunc*, in bankruptcy court from the automatic stay in order to proceed with reargument in the Pennsylvania Supreme Court. On March 29, 1988, the Bankruptcy Court ruled that the automatic stay rendered null and void Local 107's second application for reargument in the Supreme Court. Then, over plaintiffs' objection, the court lifted the stay prospectively as to both Local 107 and the plaintiffs.

Having failed to obtain a cure for the inherent defect of its second application for reargument, Local 107 filed an amended application for reconsideration *nunc pro tunc* with the Pennsylvania Supreme Court. That

Court granted the amended application on April 7, and confirmed that reargument would go forward as scheduled on April 12, 1988.[2]

On April 7, 1988, Local 107 filed a Notice of Appeal of that portion of the Bankruptcy Court's March 29 Order granting relief from the automatic stay as to the plaintiffs. The plaintiffs filed a Notice of Cross Appeal of the March 29 Order in its entirety, arguing in their subsequent briefs that *res judicata* and the Full Faith and Credit Statute, 28 U.S.C. §1738, required the bankruptcy court to honor the final judgment of record and leave the stay in place. That appeal is still pending before the United States District Court for the Eastern District of Pennsylvania.

On September 28, 1988, the Supreme Court of Pennsylvania announced its new decision in the case of *Gajkowski v. International Brotherhood of Teamsters*, 548 A.2d 533 (1988). Justice Papadakos wrote for the Court explaining that although he had been a member of the 4-3 majority which originally held the Union accountable in damages in accordance with the jury's verdict, he had been "awakened" by the "repeated requests for reconsideration" filed by Local 107 to a different interpretation of the law which necessitated a change in the outcome of the case. 548 A.2d at 534. The remaining two members of the original majority[3] dissented on the basis of the original opinion of Justice Hutchinson. Justice Zappala and Chief Justice Nix joined in the new result, but on the basis of the analysis they had set forth in a dissent to the original decision. 548 A.2d at 544.

Plaintiffs filed a timely application for reconsideration and reargument of the September 28, 1988 Opinion and Order of the Pennsylvania Supreme Court arguing *inter alia* that the Court, by arbitrarily reversing its previous final judgment, had deprived plaintiffs of their property without due process

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[2] Prior to the argument, *amicus curiae* briefs were filed in support of Local 107 by the Pennsylvania Conference of Teamsters; Pennsylvania AFL-CIO; Teamsters Joint Council No. 40 of Pittsburgh; Philadelphia Building & Construction Trades Council; Transport Employers Association; Council 13, American Federation of State, County and Municipal Employees; Philadelphia Federation of Teachers, Local 3; and United Food and Commercial Workers, Local 1357, AFL-CIO.

[3] Justice Hutchinson, the author of the original majority opinion, had left the Court just prior to the filing of the second application for reargument to assume a position on the Third Circuit Court of Appeals. His replacement on the Supreme Court, Justice Stout, adopted his position and joined the dissenters to the second opinion.

of law, in violation of the fourteenth amendment to the United States Constitution. That application was denied by the Court without opinion on December 1, 1988.

REASONS FOR GRANTING THE WRIT

This case presents the rare situation of a state court of last resort acting so arbitrarily and so irrationally, in violation of its own rules, as to exceed the constitutional limits on its power. The Pennsylvania Supreme Court, when it changed a previous final judgment awarding money damages to the plaintiffs, deprived them of their property without due process of law. Because litigants are entitled to rely on the finality of their judgments when the rules dictate they are final, and on the integrity and rationality of their highest state court, this Court should issue its writ to review the highly irregular decision of the Pennsylvania Supreme Court.

The property right at issue in this proceeding was vested in the plaintiffs by the August 31, 1987 judgment of the Pennsylvania Supreme Court, affirming the jury's award of money damages to the plaintiffs against Local 107. Under Pennsylvania law, a final judgment for money damages creates a vested property right, of which a court may not deprive the judgment creditor without due process of law.[4] *Pennsylvania Co., Etc., v. Scott*, 346 Pa. 13, 29 A.2d 328 (1942); *Ladner v. Siegel*, 298 Pa. 487, 148 A. 699 (1930); *Tradesmen's National Bank & Trust Co. v. Floyd*, 156 Pa. Super. 141, 39 A.2d 728 (1944). Such state-created property rights are entitled to the protection of the due process clause of the fourteenth amendment. *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 92 S.Ct. 2701 (1972).

The August 31, 1987 judgment, after the denial of the only petition for rehearing allowed by the Pennsylvania Rules of Appellate Procedure, became final and unreviewable in the state court system. The fact that Local 107 could have petitioned this Court for certiorari if constitutional rights were implicated does not negate the finality of the judgment. Under Pennsylvania law a judgment becomes final if no further action is required to determine the

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[4] The due process clause prohibits a state from depriving "any person of life, liberty or property without due process of law . . .." The prohibition refers to all instrumentalities of the state, including its judicial authorities. *Chicago, Burlington and Quincy Railroad v. Chicago*, 166 U.S. 226 (1897); *Ladner v. Siegel*, 298 Pa. 487, 148 A.699, 702 (1930).

matter litigated. *In Re Meade Land & Development Co., Inc.*, 1 B.R. 279, 283 (Bankr. E.D.Pa. 1979).

Nor can the arbitrary and unprecedented act of the Pennsylvania Supreme Court in granting a second and untimely petition for rehearing alter the fact that the original judgment had become final by operation of state law. If that were the case, no state court judgment could ever be considered final, since it would always be subject to a sudden change of heart by one or more Justices. Finality is determined not by the whim of the state Supreme Court, but by a rule of law. Under that rule, the August 31 judgment was final and vested a property right in the plaintiffs.

Federal courts have recognized that a tort judgment, once it has become final pursuant to state law, is a vested property right entitled to due process protection. In *Evans v. City of Chicago*, 689 F.2d 1286 (7th Cir. 1982), the Seventh Circuit held that the city's practice of delaying payments of tort judgments, which became vested property rights once no longer subject to review or modification, for three or more years deprived the judgment holders of their property without due process of law. Other courts have found that tort judgments do confer vested property rights on the judgment holder, while disagreeing over whether the right becomes vested when the injury occurs, *see Greyhound Food Management, Inc. v. City of Dayton*, 653 F. Supp. 1207 (S.D.Ohio 1986); or only when a final and unreviewable judgment has been obtained. *See In Re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir. 1987); *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986).

Under any of these formulations, the plaintiffs clearly held a vested property right, because their judgments against Local 107 had become final and unreviewable under Pennsylvania law after denial of the only petition for reconsideration allowed by law.

This Court has stated that "the touchstone of due process is protection of the individual against arbitrary action of the government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S.Ct. 2963, 2975 (1974). *See also, Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 622, 665 (1986) (the due process clause was "intended to secure the individual from the arbitrary exercise of the powers of government"). Furthermore, the requirements of due process may not be satisfied by procedural protections alone; arbitrary deprivations are an example of "governmental actions that even if undertaken with a full panoply of procedural protection, are in and of themselves antithetical to fundamental

notions of due process." *Parratt v. Taylor*, 451 U.S 527, 545, 101 S.Ct. 1908, 1918 (1988)(Blackmun, J., concurring).

Allegations of deliberate government action which does not appear to have a rational basis and which deprives an individual of protected rights may state a claim for violation of substantive due process. *See, e.g., Bello v. Walker*, 840 F.2d 1124 (3d Cir. 1988) (substantive due process rights could be violated if officials follow constitutionally adequate procedure but deliberately and arbitrarily abuse government power to deny the application); *McDonald v. Board of Mississippi Levee Commissioners*, 646 F.Supp. 449 (N.D. Miss. 1986); *affirmed*, 832 F.2d 901 (5th Cir. 1987)(local Board which limited landowner's property rights pursuant to vague and arbitrary policy deprived landowner of substantive due process).

The same principle is clearly applicable to the actions of state courts. State court decisions may violate substantive due process if, for example, they take away protected rights without substantial evidence, *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624 (1960); *Demorest v. City Bank Co.*, 321 U.S. 36, 42-43, 64 S.Ct. 384, 388 (1944)(*dictum*); or if the error is so gross and obvious as to approach the boundary of arbitrary action, *Roberts v. City of New York*, 295 U.S. 264, 277, 55 S.Ct. 689, 692 (1935)(*dictum*); or if the state court engages in a "perverse reading of the law," *O'Neil v. No. Colorado Irrigation Co.*, 242 U.S. 20, 37 S.Ct. 78 (1916)(*dictum*). Upon such a finding, it is within the power and duty of the federal court examining the state court decision to find it void as obtained in violation of due process. *See, e.g., Thompson v. Louisville, supra.*

The action of the Pennsylvania Supreme Court in allowing a second and untimely petition for rehearing and, pursuant to it, withdrawing a final judgment which had already vested property rights in the plaintiffs was arbitrary, irrational, and without precedent.[5] It was done in violation of the

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[5] Although Justice Papadakos, in the September 28, 1988 opinion, attempted to demonstrate that the grant of the Petition for Reargument *Nunc Pro Tunc* was not a "flagrant or unusual disregard of the rules of this Court," the cases he cited in support of his assertion provide no precedent for this case. Two of them were criminal cases, decided in favor of the defendants, which are irrelevant to this case since no property right of the Commonwealth was infringed. *Commonwealth v. Swanger*, 453 Pa. 107, 307 A.2d 875 (1977); *Commonwealth v. Blair*, 470 Pa. 598, 369 A.2d 1153 (1973). In another, *Luskey v. Steffron*, 469 Pa. 377, 366 A.2d 223 (1976), the Court granted reargument only for the purpose of clarifying for other litigants the effective date of its original ruling. By accepting reargument outside

(footnote continued on next page)

Court's own Rule 2547, providing that " . . . second or subsequent applications for reargument . . . will not be received." And, as clearly stated in Justice Papadakos' opinion, it was done not because new facts had come to light, not because the judgment was fraudulently procured, or even because the Court had previously overlooked some fact or point of law. The previous final judgment was withdrawn and plaintiffs were deprived of their property simply because one Justice, "upon due reflection . . . concluded that Part II [of the original opinion] comes to an erroneous conclusion because it improperly applies, without expressly saying so, the doctrines of *respondeat superior* and vicarious liability to this situation." 548 A.2d at 541. The August 31, 1987 opinion of Justice Hutchinson had not overlooked any of the points relied upon by Justice Papadakos; indeed, that opinion considers at length the standard of liability for labor unions in the context of the Pennsylvania Labor Anti-Injunction Act. *See* 530 A.2d at 855-58.

Rule 105(a), Pa.R.A.P., providing for Waiver or Modification of Rules, cannot justify the Court's action in this case because it is limited to situations in which "good cause" is shown for the disregard of other rules. And if "good cause" were read to encompass any reason that may occur to the Supreme Court, the entire system of Appellate Rules would be superfluous. Rule 105(a) exists for those few situations in which compelling reasons, such as

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the normal time period the Court did not, as here, take away the judgment of a victorious party. Likewise, in *Dozer v. Rosenberg*, 431 Pa. 311, 246 A.2d 330 (1968), the Court, after the denial of a reargument petition, *sua sponte* granted reargument and cancelled its previous order to remand the case to the lower court to determine the sufficiency of damages. By granting reargument, the Court merely finalized a judgment which would otherwise have still been open.

In *Estate of Ciaffani*, 498 Pa. 267, 446 A.2d 225 (1982), the Court treated a Motion for New Trial *nunc pro tunc* as a second application for reargument and ordered a new trial in a disputed will action. That case did not involve, as does this one, a final judgment at law for money damages, and the Court emphasized that there had as yet been no final distribution pursuant to the probated will.

Finally, Justice Papadakos' citation to *Winn v. TWA*, 506 Pa. 138, 484 A.2d 392 (1984), is perplexing since, although an untimely application for reargument was at first granted, the appeal was subsequently dismissed on a finding that reargument had been improvidently granted. 515 A.2d 303 (1986).

Thus, Justice Flaherty's assessment, that the Court's action was "highly irregular and without precedent" (Flaherty dissented to the granting of the amended application for reconsideration *nunc pro tunc*) is accurate.

newly discovered facts or evidence of fraud, make necessary a departure from the rules in order to do justice.[6] In this case, however, the rule that enforces the all-important concept of finality of judgments, without which our judicial system could not function,[7] was disregarded merely because a Justice decided to take a different view of a previously considered point of law. Such an action is completely arbitrary and cannot be justified by a "good cause" argument or by any other rational explanation. As a flagrant violation of established rules without justification, it represents an abuse of power that deprived the plaintiffs of their due process rights.

This substantive due process claim is not based solely on the fact that the Pennsylvania Supreme Court made an erroneous decision, or that it failed to follow its own rules. The petitioners recognize that these errors, in and of themselves, would not give rise to a constitutional claim. This case, however, falls within the category of state court action so arbitrary and irrational as to violate substantive due process rights, as well as to undermine public confidence in the judicial process. If a state court can act in such flagrant violation of the principle of finality of judgments, for no reason other than a claimed change in interpretation of a legal principle already thoroughly litigated and judicially analyzed, then no litigant can count a judgment final according to recognized law, nor consider any property secure from an arbitrary taking.

The petitioners acknowledge that this Court itself has not always seemed to adhere to the important principle that judgments, once they have become final according to the Court's rules, should not be disturbed. *See Cahill v. New York, New Haven & Hartford R. Co.*, 351 U.S. 183, 76 S.Ct. 758 (1956);

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[6] *Cf.* Fed. R. Civ. P. 60, which provides for relief from a final judgment only in certain limited circumstances, including mistake, newly discovered evidence, fraud or other misconduct.

[7] "Indefinite continuation of a dispute is a social burden. It consumes time and energy that may be put to other use, not only of the parties but of the community as a whole. It rewards the disputatious. It renders uncertain the working premises upon which the transactions of the day are to be conducted. The law of *res judicata* reduces these burdens even if it does not eliminate them, and is thus the quintessence of the law itself: A convention designed to compensate for man's incomplete knowledge and strong tendency to quarrel."

Restatement (Second) Judgments, Ch. 1 at p.11.

Of course, the Full Faith and Credit statute, 28 U.S.C. §1738, would be rendered useless without the finality principle.

United States v. Ohio Power Co., 353 U.S. 98, 77 S.Ct. 652 (1957); and *Gondeck v. Pan American World Airways, Inc.*, 382 U.S. 25, 86 S.Ct. 153 (1965). However, in none of these cases did the Court simply reverse a previously final judgment securing property rights for no reason other than a change of mind. In *Cahill, supra*, the Court had summarily reversed a Court of Appeals judgment overturning a district court judgment for the plaintiff. Later in that term, after a Motion for Rehearing had been denied, the Court granted a "Motion to Recall and Amend the Judgment" to correct its mandate and remand the case to the Court of Appeals to consider a point raised by defendants in the earlier appeal but not ruled on by that Court. 351 U.S. at 184. On remand, the Court of Appeals affirmed the district court judgment. 236 F.2d 410 (2d Cir. 1956).

In *United States v. Ohio Power Co., supra*, the Court, after denying certiorari and two petitions for rehearing, vacated the denial *sua sponte* in order to reverse a Court of Claims judgment and make it consistent with intervening rulings from two other courts on the issue. It should be noted that both of these cases were decided by a 1-vote majority over strong dissents by Justice Black and Justice Harlan, respectively.

The only other case of which petitioners are aware in which this Court granted a rehearing petition out of time was *Gondeck, supra*, when the Court granted a petition for rehearing three years after the last petition was denied, in order to reverse a court of appeals decision denying death benefits to a widow under the Longshore & Harborworkers Compensation Act. The Court did so because an intervening decision of another court had granted benefits for another victim of the same accident, and the Court was moved to correct an obvious injustice.

As inexplicable as these three decisions may seem, it can at least be said that in each, the Court acted against its own rules either because intervening events had rendered the original decision erroneous and unjust (*Ohio Power* and *Gondeck*); or it simply was correcting its own mandate so that a legal claim completely overlooked by the appellate courts could be considered (*Cahill*).

In no case has this Court claimed, as has the Pennsylvania Supreme Court in this case, the power to erase final judgments and rehear a matter at any time, simply because "further reflection" suggested a different view of the law. Furthermore, it appears that in recent years the Court has repudiated even this infrequent disregard of the finality principle, since there have been no more

instances of untimely rehearings granted since *Gondeck*, and in fact the Court in 1970 refused to follow *Gondeck* in another case involving exactly the same situation of inconsistent awards. *Weed v. Bilbrey*, 400 U.S. 982, 91 S.Ct. 361 (1970)(Douglas, J., dissenting from denial of certiorari). And in *Arizona v. California*, 460 U.S. 619, 103 S.Ct. 1382 (1983), a case of original jurisdiction in the Supreme Court, the Court emphasized the limits on its *power* to rehear its own case after a final judgment had been entered and principles of *res judicata* applied:

> There is no question that if these claims were presented in a different proceeding, a court would be without power to reopen the matter due to the operation of *res judicata*. That would be true here were it not for Article IX of the 1964 decree which provides:
>
> > 'Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy.'

460 U.S. 617-18, 103 S.Ct. 1390-91. Thus, absent an express retention of continuing jurisdiction in the judgment itself, this Court stated that it would have no *power* to reopen its previous judgment.

Petitioners submit that the firm view of the finality of judgments expressed by this Court in *Arizona v. California*, *supra*, is necessary to the functioning of the judicial system.[1] Moreover, it is constitutionally required in a case such as this one, when property rights have vested in the judgment. The second judgment of the Pennsylvania Supreme Court directly conflicts with this Court's analysis in *Arizona v. California*, *supra*, by disregarding the finality of that Court's previous judgment under its own rules. It also deprived the plaintiffs of their right to substantive due process, or to be free from arbitrary state court action. This Court should issue its writ to review the action of the Pennsylvania Supreme Court and correct its disregard of a basic constitutional right.

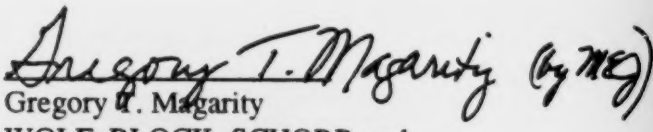
---

[1] This Court has noted a trend in federal courts in recent years toward expanding the preclusive effects of judgments. *Allen v. McCurry*, 449 U.S. 980, 101 S.Ct. 411, 415 n.6.

CONCLUSION

For the foregoing reasons, petitioners respectfully request this Honorable Court to issue its writ of certiorari to review the judgment and opinion of the Pennsylvania Supreme Court.

Respectfully submitted,



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APPENDIX

TABLE OF CONTENTS

	Page
Order Denying Reargument	1a
Judgment, Supreme Court of Pennsylvania, 9/28/88	2a
Opinion, Supreme Court of Pennsylvania, 9/28/88	3a
Opinion, Supreme Court of Pennsylvania, 8/31/87	22a
Opinion, Superior Court of Pennsylvania	42a
Opinion, Three-Judge Panel of Bucks County Court of Common Pleas	61a

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SUPREME COURT
EASTERN DISTRICT

IN THE
SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

RONALD AND FRANCES GAJKOWSKI, ROBERT SCHIPSKE AND WILLIAM AND JEAN ABATE Appellants,	:	No. 128 E.D.
v.	:	Appeal Docket, 1986
HIGHWAY TRUCK DRIVERS AND HELPER LOCAL UNION NO. 107 Appellee.	:	

APPLICATION FOR RECONSIDERATION AND REARGUMENT OF THE OPINION AND ORDER OF THIS COURT FILED SEPTEMBER 28, 1988, REVERSING THE PREVIOUS OPINION AND ORDER OF THIS COURT FILED AUGUST 31, 1987

Appeal By Allowance From the Order of January 29, 1986 of the Superior Court at Nos. 02585, 92586 and 92587 Philadelphia, 1984 Reversing the Order of September 5, 1984 of the Court of Common Pleas of Bucks County at Nos. 80-6719-09-2, 80-6720-11-2 and 80-6721-12-2

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Justice McDermott
did not participate.

December 1, 1988
Justice Zappala
did not participate.

SUPREME COURT OF PENNSYLVANIA

EASTERN DISTRICT

RONALD AND FRANCES GAJKOWSKI, ROBERT SCHIPSKE, and WILLIAM and JEAN ABATE,	:	**No. 128 E.D. Appeal Docket 1986**
Appellants	:	
v.	:	
INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and HIGHWAY TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 107	:	
	:	

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the *ORIGINAL OPINION AND ORDER IS WITHDRAWN AND THE JUDGMENT OF THE SUPERIOR COURT IS AFFIRMED.*

Marlene F. Lachman, Esq.
Prothonotary

Dated: 9/28/88

Ronald and Frances GAJKOWSKI, Robert Schipske, and William and Jean Abate, Appellants,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and Highway Truck Drivers and Helpers Local Union No. 107, Appellees.

Supreme Court of Pennsylvania.

Reargued April 12, 1988.
Decided Sept. 28, 1988.

Original opinion withdrawn and judgment of superior court affirmed.

Zappala, J., concurred and filed opinion in which Nix, C.J., joined.

Flaherty, J., dissented and filed opinion in which McDermott and Stout, JJ., joined.

Gregory T. Magarity, Philadelphia, for appellants.

Thomas W. Jennings, William J. Einhorn, Albert A. Ciardi, Jr., Philadelphia, for appellees.

Louis B. Kushner, Pittsburgh, for amicus -- Team. Joint Council No. 40 of Pittsburgh.

Richard Markowitz, R. David Walk, Philadelphia, for amicus -- Pa. Conference of Teamsters.

Jerome H. Gerber, Irwin W. Aronson, Harrisburg, for amicus -- Pa. AFL-CIO.

Bernard N. Katz, Philadelphia, for amicus -- Philadelphia, Bldg. & Const. Trades Council.

Alaine S. Williams, Philadelphia, for amicus -- Council 13, etc.

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, ZAPPALA, PAPADAKOS and STOUT, JJ.

OPINION ANNOUNCING THE JUDGMENT OF THE COURT

PAPADAKOS, Justice.

When the case was first decided on the majority opinion of Mr. Justice Hutchinson, I was a member of the 4-3 majority which held the local union accountable in damages for serious injuries inflicted upon the plaintiffs on the strike line. I joined the opinion which coincided with my view of negligence law which provides protection to those injured from tortfeasors under basic common law principles.

The repeated requests for reconsideration eventually awakened me to the realization that the Hutchinson opinion was not merely an effort to recompense injured parties for their injuries (an effort I fully support) but, rather, intentional or not, the opinion was in effect a repudiation of legislative intent and a removal of the limited liability which the Pennsylvania Labor Anti-Injunction Act was intended to cloak labor unions with in furtherance of the legislative policy of protecting the labor movement.

Thus, I joined in the granting of the Petition for Reargument Nunc Pro Tunc, inspite of the fact that a Petition for Reargument had previously been denied and that this second petition was filed late.

The grant of the Petition for Reargument Nunc Pro Tunc should shock no one as being a flagrant or unusual disregard of the rules of this Court. This Court has acted often on late petitions, even *sua sponte*, to reconsider decisions and correct grievous errors that have far-reaching consequences.

Following the entry of an order or judgment disposing of an appeal, the general procedure is to permit applications for reargument for a fourteen day period. The time period is measured from the entry of the order or judgment involved. See, Pa.R.A.P. 2542(a). There have been times, however, when the Court has entertained petitions filed after the expiration of the fourteen day

period and for reasons of fairness has granted these petitions and ordered reargument.

In *Winn v. TWA*, 506 Pa. 138, 484 A.2d 392 (1984), the Court entered its initial decision on November 29, 1984. After the expiration of the fourteen day reargument period expired, an application for enlargement of time was filed (on December 17, 1984) and was granted by the Court on January 28, 1985. On January 30, 1985, an application for reargument was filed and granted on March 25, 1985.

In *In re: Estate of Ciaffoni*, 498 Pa. 267, 446 A.2d 225 (1982), the Court issued its initial decision on April 30, 1980, and denied reargument on June 16, 1980. (491 Pa. 46, 417 A.2d 1136 (1980.)) After a final judgment had been entered in the matter, the losing party returned to the trial court and filed a Motion for New Trial Nunc Pro Tunc. This motion was denied and a second appeal was filed with this Court. The Court treated the matter as a second application for reargument under Pa.R.A.P. 105(a) and granted the petition and remanded for a new trial.

In *Commonwealth v. Blair*, 470 Pa. 598, 369 A.2d 1153 (1977), the Court disposed of a direct appeal on October 3, 1975 (463 Pa. 383, 344 A.2d 884 (1975)), and one year later, on October 19, 1976, granted a petition for reargument *nunc pro tunc*.

In *Lusky v. Steffron, Inc.*, 469 Pa. 377, 366 A.2d 223 (1976), the Court issued its initial opinion on April 17, 1975. After the time had expired for a petition for reargument (on May 15, 1975), the losing party filed a Petition for Clarification which was granted and the matter was reargued.

In *Commonwealth v. Swanger*, 453 Pa. 107, 307 A.2d 875 (1973), the Court filed an opinion on January 19, 1973 and denied a petition for reargument on February 23, 1973, and the sua sponte reconsidered its denial order and vacated same thereby granting reargument on March 22, 1973.

In *Dozer Agency, Inc. v. Rosenberg*, 431 Pa. 321, 246 A.2d 330 (1968), the Court filed an opinion on March 22, 1966 and remanded for a re-evaluation of damages. A petition for reargument was timely filed and denied. "Sometime thereafter, this Court, *sua sponte* determined that reargument should be held limited to the question of the adequacy of the damages awarded by the court below and such reargument was held." *Dozer*, 431 Pa. at 323, 246 A.2d at 331 (1968).

For the reasons set forth below, I must repudiate my concurrence with the Hutchinson opinion, yet I cannot join with the theories supported by Mr. Chief Justice Nix and Mr. Justice Zappala. I believe that the original opinion and order dated August 31, 1987 should be withdrawn and judgment entered for the international and local union defendants.

Appellee, Highway Truck Drivers and Helpers Local Union No. 107 (Local 107) is an unincorporated association whose purpose as a labor organization is to represent employees in matters of collective bargaining with their respective employers throughout the Philadelphia Metropolitan Area. It is currently comprised of approximately 5,000 members on whose behalf it is signatory to more than 275 collective bargaining agreements with various employers throughout the Philadelphia Metropolitan area.

One of the employers with whom Local 107 has a collective bargaining agreement is the Minnesota Mining and Manufacturing Company (3M) in Bristol, Pennsylvania. Local 107 represents approximately 500 production and maintenance employees at that facility. On November 18, 1979, a majority of those employees voted by secret ballot to reject the Company's "final offer" for the terms of a new collective bargaining agreement. Local 107 commenced a lawful economic strike on the following day against the Company in support of their positions.

For the next ten weeks, approximately 500 employees continuously maintained a peaceful picket line at the Company's facility for 24 hours a day, seven days a week. On January 25, 1980, this peace was suddenly broken by the senseless shooting and maiming of two Local 107 members and a friendly security guard (Appellants herein), all of whom were at or near the picketing site. The assailant was one Robert Ballinger, a member of Local 107, who shot the victims with a .22 caliber revolver. Ballinger later pled *nolo contendere* to criminal charges arising from the incident.

As a result of that shooting incident, Appellants file suite against Local 107 and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (International) (IBT). The matter was tried before a jury in the Court of Common Pleas of Bucks County in February and March of 1984. That jury returned a verdict in favor of Appellants and against Appellees, Local 107 and the International, jointly and severally, in the aggregate amount of 1.3 million dollars.

Local 107 and the International thereafter timely filed post-trial motions for a judgment notwithstanding the verdict (judgment n.o.v.) or, in the alternative, for a new trial, or, in the alternative, for arrest of judgment.

On September 5, 1984, the Court of Common Pleas denied the post-trial motions filed by Local 107 and the International challenging the validity of the jury's verdict. In that same order, the court entered judgments against Local 107 and the International, jointly and severally, in the following amounts:

(a) $709,131.88 in favor of William Abate;

(b) $131,150.80 in favor of Jean Abate (for loss of consortium);

(c) $618,981.42 in favor of Ronald Gajkowski;

(d) $65,575.40 in favor of Frances Gajkowski (for loss of consortium);

(e) $12,590.46 in favor of Robert Schipske.

Thereafter, Local 107 and the International appealed to the Superior Court.

On January 28, 1986, the Superior Court issued an opinion and order in which they reversed the decision of the trial court and directed that a judgment n.o.v. be entered in favor of both Local 107 and the International. Appellants, thereafter, filed a Petition for Allowance of Appeal with this Court which was granted.

On August 31, 1987, this Court filed an opinion in this matter in which we reversed the decision of the Superior Court with regard to Local 107, but affirmed the Superior Court's decision in favor of the International.

On September 14, 1987, Local 107 timely filed with the Prothonotary of this Court an Application for Reargument which was denied on October 9, 1987.

On October 16, 1987, Local 107 filed a Voluntary Petition in Bankruptcy under Chapter 11 of the Bankruptcy Code with the United States Bankruptcy Court for the Eastern District of Pennsylvania.

Thereafter, and in order to preserve their appellate rights in this matter while the bankruptcy proceedings continued, Local 107 filed with the Prothonotary of our Court, on October 22, 1987, an Application for Modification of Judgment, and on November 2, 1987, an Application for Reconsideration *Nunc Pro Tunc* of the Denial of Local 107's Application for Reargument.

On November 18, 1987, this Court issued an order granting Local 107's Application for Reconsideration *Nunc Pro Tunc* and, as a consequence, denied Local 107's Application for Modification of Judgment as moot. Oral argument was scheduled in this matter for April 12, 1988.

On March 29, 1988, the Honorable Bruce Fox, Judge of the United States Bankruptcy Court for the Eastern District of Pennsylvania, to whom Local 107's bankruptcy petition had been assigned, entered an opinion and order in which he lifted prospectively the provisions of the automatic stay set forth in 11 U.S.C. § 362(a) incident to the filing of Local 107's bankruptcy petition. The lifting of the stay was limited to Appellants and Local 107 so that the argument before this Court in this matter could occur as scheduled. At the same time, however, Judge Fox refused to ratify the action of Local 107 in filing their original Application for Reconsideration with this Court after they had already filed the Petition in Bankruptcy on October 16, 1987.

To cure any possible violation of the automatic stay provisions of the Bankruptcy Code, Local 107, on March 31, 1988, filed with this Court an Amended Application for Reconsideration *Nunc Pro Tunc* of the Denial of Local 107's Application for Reargument. The Amended Application was granted, *per curiam*, by order dated April 7, 1988. Oral argument took place on April 12, 1988, as initially scheduled.

During the course of disposing of the merits of this appeal, it will become increasingly clear why it was decided to take the extraordinary step of reconsidering *nunc pro tunc* the original denial of Appellee's Application for Reargument.[1]

---

[1] Appellee's first Application for Reargument (which we denied) was timely filed. Pa.R.A.P. 2542. While Pa.R.A.P. 2547 provides that second or subsequent applications for reargument and applications for reargument which are out of time under the rules, "will not be received," our decision to allow reargument is permitted under Pa.R.A.P. 123 and 105. Rule 123 provides for the form of an application for relief where other rules do not provide an appropriate form. Rule 105 provides as follows:

(footnote continued on next page)

The liability of Local 107 in this case (the anticipated burden of which drove them to seek relief in federal bankruptcy court) hinges on the proper application of Section 8 of Pennsylvania's Labor Anti-Injunction Act, Act of June 2, 1937, P.L. 1198, No. 308, 43 P.S. § 206h. This Act is also sometimes referred to as a little "Norris-LaGuardia" Act. Section 8 thereof provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute as herein defined, shall be held responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members or agents, except upon proof beyond a reasonable doubt in criminal cases, and by the weight of evidence in other cases, and without the aid of any presumptions of law or fact, both of--(a) the doing of such acts by persons who are officers, members or agents of any such association or organization; and (b) actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof by such association or organization.

43 P.S. § 206h.

Our statute is closely modeled on the Norris-LaGuardia Act itself, passed by Congress in 1932, Ch. 90, 47 Stat. 70 (1932) (currently at 29 U.S.C. §§ 101-115). The language of Section 8 of our Act closely parallels that of Section 6 of the federal statute, which provides as follows:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of

---

Waiver and Modification of Rules

(a) Liberal construction and modification of rules. These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every matter to which they are applicable. In the interest of expediting decision, or for other good cause shown, an appellate court may, except as otherwise provided by Subdivision (b) of this rule, disregard the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

(b) Enlargement of time. An appellate court for good cause shown may upon application enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance of appeal, a petition for permission to appeal, or a petition for review.

> actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 106.

This Court has long recognized that the purposes and content of our Act and of the federal statute closely coincide. *Philadelphia Marine Trade Association v. International Longshoremen's Association,* 453 Pa. 43, 308 A.2d 98 (1973). More specifically, the Court stated in that case that:

> We believe that Section 206h of the Pennsylvania Labor Anti-Injunction Act was intended to have the same purpose as Section 6 of the Norris-LaGuardia Act.

308 A.2d at 103.

What is the overriding purpose behind Section 8 (Section 206h) of our statute and Section 6 of the Norris-LaGuardia Act? It has been stated authoritatively that Section 6 of the Norris-LaGuardia Act reflects Congressional "... fear that unions might be destroyed if they would be held liable for damages done by acts beyond their practical control." *United Mine Workers v. Gibbs*, 383 U.S. 715, 737, 86 S.Ct. 1130, 1144, 16 L.Ed.2d 218 (1966).[2]

---

[2] Following World War II, Congress enacted the Labor Management Relations Act (LMRA), Ch. 120, 61 Stat. 136 (1947), 29 U.S.C. §§ 141-187, otherwise known as the famous (or infamous) Taft-Hartley Act, a piece of legislation that is distinctly anti-organized labor. The statute contained provisions that allow actions for damages to be brought in both state and federal courts for various unfair labor practices. The courts were called upon to decide how LMRA should be applied where sections of it appeared to conflict with parts of the Norris-LaGuardia Act. In *Gibbs, supra*, one point of controversy was whether § 301 of the LMRA, which provides that unions be held vicariously liable under standards of agency law, superceded Section 6 of the Norris-LaGuardia Act--the section indirectly at issue in the instant case. Mr. Justice Brennan's opinion concluded that Congress intended that Section 6 remain the applicable test in those situations not specifically within the coverage of the LMRA. In a valiant effort to save the Norris-LaGuardia Act and to coordinate and render consistent the two statutes, Mr. Justice Brennan emphasized the evidentiary aspects of Section 6, holding that the "clear proof" standard of Section 6 meant that a plaintiff must do more than meet the ordinary civil burden of persuasion. The burden is less, however, than the criminal burden of "beyond a reasonable doubt." This muddle, a result of the chilling effect of LMRA (Taft-Hartley), along with other qualifications in *Gibbs*, need not concern us, however, since we in Pennsylvania do not have our own version of Taft-Hartley that must be taken into account. We, therefore, must examine the purposes behind our own Act as it was originally written. See, Note, *Labor Unions--Vicarious Liability for Torts Committed by Members*, 57 Wash.L.Rev. 193, at 200, n. 45 (1981).

The statute's legislative history delineates the same purpose. In enacting the statute, it was noted in the U.S. Senate that:

> To hold that an officer or member of a labor organization, or the organization itself, should be liable for damages for unlawful acts committed while a strike is on, without clear, actual proof of authorization, participation in, or ratification of such unlawful acts, would go far towards the destruction of organized labor.

S. Rep. No. 163, 72nd Cong., 1st Sess. 19 (1932).

As was stated by the United States Supreme Court in *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 67 S. Ct. 775, 91 L.E. 973 (1947), decided before the Taft-Hartley Act entered the picture (see n.2, *supra*):

> . . . its [Section 6's] purpose and effect was to relieve organizations . . . and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes *by some individual officer or member of the organization*, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization or ratified such acts after actual knowledge of their perpetration.

330 U.S. at 403, 67 S. Ct. at 779 (emphasis added). And in *Ramsey v. United Mine Workers*, 401 U.S. 302, 91 S. Ct. 658, 28 L.E.2d 64 (1971), the United States Supreme Court further described the legislative purpose underlying Section 6 of the Norris-LaGuardia Act as follows:

> . . . the simple concern of Congress was that unions had been found liable for violence and other illegal acts occurring in labor disputes which they had never authorized or ratified and for which they should not be held responsible. Congress discerned a tendency in courts to blame unions for everything occurring during a strike.

In Part I of our original opinion in this case, we noted with approval that in *United Brotherhood of Carpenters, supra*, the Supreme Court held that the unique language of the Norris-LaGuardia Act precludes the use of *respondeat superior* or agency analysis to hold a union vicariously liable for the torts of its officers, members and agents. "*Respondeat superior*," of course, is the classic doctrine borne out of social policy that holds a master, an employer,

an association or some other group entity (like a union) responsible for damages in a legal action for the acts or omissions of its servant, its employee, its agent or its member, even though the master, employer or group entity was not itself at fault for the harm caused.

We quoted from *United Brotherhood of Carpenters* as follows:

> We hold, therefore, that "authorization" as used in §6 means something different from corporate criminal responsibility for the acts of officers and agents in the course or scope of employment. We are of the opinion that the requirement of "authorization" restricts the responsibility or liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of these associations or organizations, although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or other officers or members who actually participate in the unlawful acts, except upon clear proof that the particular act charged, or acts generally of that type and quality, had been expressly authorized, or necessarily followed from a granted authority, by the association or non-participating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence.

330 U.S. at 406-407, 67 S. Ct. at 781 (footnote omitted).

[1] We further noted that following *United Brotherhood of Carpenters*, Congress provided a right of action for money damages in certain labor disputes under the Taft-Hartley Act (see n. 2, *supra*), but that in Gibbs, *supra*, the United States Supreme Court stated that "the responsibility of a union for the acts of its members and officers [under the Taft-Hartley Act] is to be measured by reference to ordinary doctrines of agency, rather than the more stringent standards of §6 [of the Norris-LaGuardia Act]." 383 U.S. at 736, 86 S. Ct. at 1144. Hence, we correctly concluded that both under Section 6 of the Norris-LaGuardia Act, and under Section 8 of our Anti-Injunction Act, a higher showing was required than that under the common law rules of agency.

In light of the above, it is now considerably jarring to realize that we originally held Local 107 liable in this case, and precipitated their imminent demise in Bankruptcy Court, even though the Local itself, either through its top officers or anything approaching a majority of its 5,000 members never

authorized or condoned the shootings that occurred here in any way. Indeed, the result reached in our first opinion appears to thwart directly the purposes behind our Anti-Injunction Act as described above. *Mea Culpa*. The mistake, however, was easily made.

Part II of our original opinion in this case was entitled "Participation of Local 107." We thought it right to consider whether the union itself, Local 107, "participated" in the drama and so became liable to compensate the victims. We decided that it was proper for the jury in this case to conclude that enough of the membership of Local 107 and of its officers took part in the tragic events such that it was lawful to hold Local 107 liable. (Hence, we reversed the Superior Court's decision to the contrary.) To see how we came to that conclusion, and why it was incorrect, we must set forth again the detailed facts upon which we relied.[3] We stated:

"At this point, an exacting review of the 1,113 page trial transcript is necessary. The following people were primary participants in this tragedy. At the time of the strike and shooting, Joseph Cimino was president of Local 107. John Smalley was a business/agent recording secretary of the Local and chief negotiator in the ongoing discussions with 3M. Mr. Smalley was according to his own testimony, responsible for control of the picket line. N.T. February 28, 1984 at 371. William Crossan was an employee of 3M, the local union's chief steward and a member of its negotiating committee. Robert Kendig was a union steward and employee at the Bristol plant and also a member of the negotiating committee. Robert Ballinger was an employee of 3M, a member of Local 107 and the individual who fired the pistol, injuring fellow picketers Gajkowski and Schipake and 3M security guard Abate.

* * * * *

"On that fateful day, [January 25, 1980], Crossan, Kendig, Ballinger and two others went to the 'Tulleytown Tank' for lunch. Crossan stated that the men 'drank continuously' for a couple of hours. *Id.* at 424. Upon their return to the line, Crossan and Kendig began handing out leaflets to non-striking employees. *Id.* at 425. 3M Security supervisor Joseph Boxmeyer asked Crossan and Kendig to stop doing this on 3M's property. N.T. February 29, 1984 at 79-81. Kendig went on to let air out of the tires of cars on the 3M lot.

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[3] Rather than force the reader constantly to refer back to our earlier opinion, its seems to me to make more sense simply to restate our factual summary therefrom, and comment afterwards.

N.T. February 28, 1984 at 429; February 29, 1984 at 81. Later, Crossan and Kendig left in Kendig's truck, ostensibly to check on Kendig's children. Before leaving, a striker overheard Kendig remark that he was going to get a gun to shoot out 3M's lights and security camera. N.T. February 28, 1984 at 195. At Kendig's house, both Crossan and Kendig had a shot of alcohol before coming back to the line. While they were riding back to the plant, Kendig showed Crossan a gun he was storing in the trunk. Crossan made no objection to Kendig's bringing the gun on the line. N.T. February 28, 1984 at 432-434.

"Kendig took the gun into the strike trailer across the street from 3M's property. Strikers were assembled in the trailer playing cards. Kendig displayed the gun to all present and exclaimed 'deal me in.' N.T. February 27, 1984 at 121. At this, Kendig laughed and left the trailer. *Id.* at 122. The record is filled with evidence that large amounts of alcohol were consumed on the line that evening. *Id.* at 110, 113, 116; February 28, 1984 at 175, 177. Ballinger, who would later fire the injurious shots, was described by a number of witnesses as drunk. N.T. February 27, 1984 at 118; February 28, 1984 at 182. Soon, rocks and bottles were being thrown at the plant. N.T. February 27, 1984 at 126. Two witnesses credited Kendig with throwing the first bottle and shouting, 'This will get something started.' *Id.*, N.T. February 28, 1984 at 292. George Cook, the picket line captain, testified that he had been drinking and took part in throwing the rocks and bottles. N.T. February 28, 1984 at 275-76. One bottle went astray and hit Ballinger on the head. N.T. February 27, 1984 at 128; February 28, 1984 at 252.

"The once peaceful picket line deteriorated into a raucous mob. One witness described the growing tension and two witnesses characterized the situation as 'rowdy.' N.T. February 27, 1984 at 130; February 28, 1984 at 190. Joseph Boxmeyer, 3M's security head, noted in his log that the picketers were attempting to create a confrontation through their actions. N.T. February 29, 1984 at 85; Plaintiffs' Exhibit No. 59. Some time after 7:00 P.M., one picketer and an employee of 3M reported shots. N.T. February 27, 1984 at 134; Plaintiffs' Exhibit No. 36. Crossan then met Kendig near the gas station across the street from the plant; Kendig handed Crossan the pistol and urged Crossan to shoot out the lights at the plant. Crossan replied, 'I don't know how.' Kendig offered to instruct him; Crossan decided to go to the men's room. N.T. February 28, 1984 at 434-35. He admitted that he did not attempt to restrain Kendig or contact Smalley. *Id.* at 436. After Crossan departed, Kendig met up with Ballinger and Ballinger fired the shots from Kendig's gun which injured appellants.

"Jack Smalley, business agent for Local 107, testified that he was responsible for the conduct of the strike at the Bristol 3M plant. N.T. February 28, 1984 at 371. He asserted that Local 107 had a rule against drinking alcoholic beverages on the picket line. *Id.* at 376, 379. At least four witnesses testified there was no such rule. N.T. February 27, 1984 at 110; February 28, 1984 at 236, 241, 273. Smalley stated that he was aware of drinking on the line but admitted he took no steps to curb it. *Id.* at 388-390. George Cook testified that on one occasion he observed George Massimini, another business agent of Local 107, delivering alcoholic beverages to the strikers. *Id.* at 279-280.

* * * * *

"This record also includes circumstantial evidence that Joseph Cimino, president of Local 107, sanctioned the assault on the Bristol plant. Three days prior to the events of January 25, Cimino attended a meeting at the Washington, D.C. office of the IBT to discuss a number of unresolved issues. Present were Cimino, Norman Weintraub, an IBT economist, Joseph Cotter, an IBT staff employee, Nelson Schmidt, a 3M attorney, and Robert Hanson, a 3M personnel manager. At the conclusion of the meeting, Cimino and Hanson agreed to re-evaluate their positions during a follow-up phone call. Mr. Hanson's notes, introduced into evidence by stipulation, reveal the content of his conversation with Cimino on January 25, the day of the melee:

> Joe Cimino called me answering my call to Cotter. Summary of conversation: We need all 13 items I gave you yesterday. People are adamant and strong. I've spent a lot of time on picket line. They won't go back to work for a few cents. I've got to represent them. We're going to extend our picketing. I've got approval from the Int. *We're going to do what we have to do--it's been peaceful for ten weeks--it's getting hot now--they are up tight--we've got to get mgmt's attention.* I have no malice--I won't lie to you or sandbag you. These people don't like being 2nd class citizens--they compare rates and benefits with St. Paul, and other three plants & don't like being behind. Everybody has sick days these days. You get injunction & then tell us where you're shipping all boxcars--it's written on cars 'To Anchor' or 'To Leno'--that's really rubbing salt in wounds. First time they're doing it. We're have (sic) a demonstration Mon. in Phil.--95% of 3M will be there and some truck drivers.

Plaintiff's Exhibit No. 28 (emphasis added). The appellees contend that Mr. Cimino's statement refers to legitimate efforts to extend the picketing to

other 3M facilities and a rally to be held in Philadelphia to demonstrate support for Local 107 . . . ." (footnote omitted).

[2] On the basis of these facts, we concluded in Part II of our original opinion that the jury could properly infer that there was sufficient evidence to find that enough of the membership of Local 107 and enough of its officers took part in the tragic events of January 25, 1980, to hold the Local itself liable *as a participant* for the personal injuries caused. The logic of this conclusion appears unexceptional. It is straightforward, and it is familiar to any practicing lawyer. It is deceptively alluring even though the logic produces a result that is at odds with the overriding purpose and intent of Section 8 of the Anti-Injunction Act. Our initial opinion was at war with itself, but the flaw in the logic of Part II thereof is not readily obvious. Upon due reflection, however, I have concluded that Part II comes to an erroneous conclusion because it improperly applies, without expressly saying so, the doctrines of *respondeat superior*, and vicarious liability to this situation. These are standard doctrines of agency law. They are, however, precisely the doctrines or types of analyses that we are *forbidden* to apply under Section 8 of our Anti-Injunction Act! To do so *sub silentio* was error. They crept into use because we chose to employ them in order to address the question of whether Local 107 "participated" in the acts causing the injuries at issue. Under these facts, it was the wrong question to ask. While Section 8 of our statute and Section 6 of the federal statute both use the term "participation in" in apparent reference to a labor organization, surely that term was not meant to provide a back-door invitation to the courts to apply doctrines like *respondeat superior* which could not be applied directly; nor could it have been intended to be a back-door or loophole available for us to introduce doctrines whose use would effectively dismantle the statutes themselves.

In order to correct the blatant error which undermined the legislative intent and placed organized labor in the precarious position sought to be avoided by the Pennsylvania Labor Anti-Injunction Act, the extraordinary step was taken of granting the Application for Reconsideration *Nunc Pro Tunc* as well as the Amended Application for Reconsideration *Nunc Pro Tunc*.

The key to my present analysis comes from a careful reading of and reflection upon, *United Brotherhood of Carpenters v. United States*, *supra*, particularly Mr. Justice Frankfurter's dissenting opinion. He contended that Section 6 of the Norris-LaGuardia Act was:

> . . . directed against decisions by some of the federal courts in litigation involving industrial controversies. The abuse was misapplication of the law of agency so that labor unions were held responsible for the conduct of individuals in whom was lodged no authority to wield the power of the union. By undue extension of the doctrine of conspiracy, whereby the act of each conspirator is chargeable to all, unions were on occasion held responsible for isolated acts of individuals, believed in some instances to have been *agents provocateurs* who held a spurious membership in the union during a strike. Congress merely aimed to curb such an abusive misapplication of the principle of agency. It did not mean to change the whole legal basis of collective responsibility. By talking about "actual authorization," Congress merely meant to emphasize that persons for whose acts a corporation or a union is to be held responsible should really be wielding authority for such corporation or union.
>
> The Congressional purpose behind §6, then, is clear. All that Congress sought to do was to eliminate an extraneous doctrine that had crept into some of the decisions, whereby organizations were held responsible not for acts of agents who had authority to act, but for every act committed by any member of the union although not authorized by virtue of his position to act for the union in what he did. And so Congress charged the federal courts with the duty to look sharply to the relation of the individual to the affairs of the organization, and not to confound individual with union unless the individual is clothed with power by the union, in the ordinary way of union operation, in doing what he does for the union. A basis for liability which has entered into the warp and woof of our law, as is true of the responsibility of collective bodies for the acts of their agents, should not be deemed to have been uprooted by an enactment which merely emphasizes that basis and rules out its distortions. 1932 was too late in the day for Congress not to have known that unions, like other organizations, act only through officers, and that unions do not, any more than do other organizations, explicitly instruct their officers to violate the . . . [law].

330 U.S. at 418-420, 67 S. Ct. at 787-788 (footnote omitted).

[3] This is, of course, the position *rejected* by the majority in *United Brotherhood of Carpenters*. But Mr. Justice Frankfurter's sharp dissent clarifies the points that were actually decided in that case. Any organization such as a corporation, a partnership, or an unincorporated association (like Local 107), to the extent that it has a legal existence distinct from that of its members themselves, is a fictitious legal entity. As such, the organization

itself can *only* act through its agent or agents. Officers are merely a special type of agent authorized to undertake specific types of activities. Any time that legal liability is imposed on such an organization, it is vicarious liability or liability based on *respondeat superior*. The organization is held liable for the acts or derelictions of its agents. Mr. Justice Frankfurter correctly notes that a principal abuse that occurred prior to the passage of the Norris-LaGuardia Act was that unions and their individual members were held liable as co-conspirators when other members engaged in unlawful activity. His contention that, by passing the Norris-LaGuardia Act, Congress had only attempted to modify or correct the application of agency principles in such cases, rather than substantially curtail the application of such doctrines, did not prevail, however. The majority focused on the concept of "authorization" and limited the liability in labor disputes of employer or employee associations or organizations to those situations where unlawful acts were expressly authorized or necessarily followed from a granted authority, or where there was subsequent ratification.[4]

[4-6] On the basis of that analysis, it is clear on this record that neither the shootings that occurred here themselves, nor the deplorable combination of escalating tensions, alcohol and firearms that preceded them, were expressly authorized by the top officers or leadership or the full membership of Local 107. Nor can I find that the violent acts necessarily followed from the authority granted by the union to the members directly involved in the misdeeds. The union members involved had express authority to picket from their membership, nothing more. They certainly had no expressed or general authority to engage in violence that I can detect in this record.[5] I am mindful

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[4] See, 330 U.S. at 406-407, 67 S. Ct. at 781. The relevant passage is quoted in full at pp. 537-38, supra.

It must be noted that both Section 8 of our statute, and Section 6 of the Norris-LaGuardia Act, protect employer associations and organizations involved in labor disputes from extensive vicarious liability, as well as employee entities.

Subsequent ratification of the violent acts committed here by Local 107 did not occur and is not an issue in this case.

In contrast to the authorization theory adopted herein, under a respondeat superior theory, a master is liable for damages caused by the torts of its servants performed in the scope of their employment, regardless of the master's authorization (or ratification) of the misconduct. Restatement (Second) of Agency §216 (1958).

[5] As footnote 8 of our original opinion indicates, the notes kept by Mr. Robert Hanson with respect to statements by Local President Cimino three days before the shooting, to the effect that things were going to get hot, in and of themselves, are too ambiguous to prove authorization by Local 107. The relevant text from Mr. Hanson's notes is fully set forth at p. __, *supra*.

of Mr. Justice Frankfurter's argument to the effect that under these standards, a large union would never deliberately authorize the use of violence or other unlawful tactics that would later give rise to a claim for damages. I agree that formal *de jure* authorization would seldom, if ever, occur in a large, well counseled union. Nevertheless, *de facto* authorization would always be a possibility, for example, where the union leadership informally ordered the use of violence without a formal meeting or formal vote. Be that as it may, there is no evidence here that these shootings, or the chaos that led to them, was authorized by the leadership of Local, either *de jure* or *de facto*. The fact that individual shop stewards, negotiating agents or a picket line manager were involved in the events leading to the shooting does not change the result. There is virtually no evidence that they were ordered or authorized in any way by the leadership, or the full 5,000 person membership of Local 107, to do what they did. There is no evidence whatever that they exercised, or were granted the discretion to exercise, the authority of the Local itself to engage in violence. Moreover, even if the individuals at fault here are to be considered officers of the Local, both Section 8 of the Anti-Injunction Act (as well as Section 6 of the Norris-LaGuardia Act) expressly excludes organizational liability for "the unlawful acts of individual officers," as well as the unlawful acts of mere members or agents, unless the organization authorized the acts. That simply did not happen here.

What remains of the question of whether Local 107 was guilty of "participation in" the illegal acts of question? While we originally were of the opinion that Local 107 was liable under this language, which we held was to be applied with reference to the number of persons involved in the illegal acts, the status of these persons in the organization, and whether the organization was aware of and in a position to exercise control over such acts, I now recognize, as explained above, that we improperly adopted standards necessarily involving the agency law concepts of vicarious liability and *respondeat superior* to answer the question. Does the participation concept now retain any vitality aside from using agency law principles to apply it, however, and if not, are we reading a clause out of Section 8 of our statute? My review of cases in other jurisdictions with respect to the concept of participation provides few guidelines. My reading of the language of our own statute, however, as well as that of the federal Act, inevitably draws me to the observation that neither statute is drafted as carefully as one might wish. I think it can be plausibly argued that the term "actual participation in" in our statute is meant to refer to the exposure to liability of an individual officer or member; and that an association or organization can only be found liable for damages if it authorized or ratified the unlawful acts. This certainly would be a more natural use of the English language, that is, to read the statute to the effect that

individuals (but not legal entities themselves) participate in illegal activity. The statutes were drafted conjunctively, of course, and potential organizational liability was disposed of in the same sentence in which potential individual liability is also mentioned. Whether my reading is accurate or not (and it must be conceded that our statute recognizes that an association or organization may be "participating or interested in a labor dispute"--although this implies a formal, authorized, organizational type of participation), I, nevertheless, remain convinced on the basis of *United Brotherhood of Carpenters* that an organization's participation cannot be determined under our statute by reference to principles of vicarious liability or *respondeat superior*.[6] What *is* left, however, is the possibility that the vast majority of a union's members (or employer strike breakers) break rank with their leadership and spontaneously plan or engage in some sort of mob violence. While we do not expressly address or decide the question, that would be a reasonable and limited example of a situation where unlawful acts were not authorized by an organization, but were effectively participated in by it.[7] It would also be consistent with the goals and purposes of our statute.

In any event, I am certain that on the facts in this case, it would be contrary to our statute to hold Local 107 (comprised of some 5,000 members) liable for the misdeeds of a few malefactors where their acts were not in any way authorized by the Local or its leadership.

I am aware that a number of academicians, specializing in the field of law and economics, would argue *that* labor unions are not in the precarious position they were 50 years ago; *that* they are often large enterprises better able to bear the loss of picket line injuries through insurance or "loss-spreading" than previously; and *that* as a matter of policy the courts, therefore, should impose through creative interpretation the doctrine of *respondeat superior* on unions in order to compensate the victims of picket line violence and force unions to bear the loss.[8]

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[6] There are only a handful of state court decisions that have reached the opposite conclusion. See, *e.g.*, *Buchanan v. International Brotherhood of Teamsters*, 617 P.2d 1004, 94 Wash. 2d 508 (1980); *Titus et al .v. Tacoma Smeltermen's Union Local No. 25*, 383 P.2d 504, 62 Wash. 2d 471 (1963); *United Brotherhood of Carpenters v. Humphreys*, 127 S.E. 2d 98, 203 Va. 781 (1962); *Nelson v. Haley*, 111 N.E. 2d 812, 232 Ind. 314 (1953). For a general review of the subject, see, Note, *Tort Liability Unions for Picket Line Assaults*, 10 U. Mich. J.L. Ref. 517, at 525-528 (1977).

[7] In this connection, see *Lubliner v. Reinlib*, 50 N.Y.S.2d 786, 184 Misc. 472 (1944).

[8] See, *e.g.*, Comment, *The Liability of Labor Unions for Picket Line Assaults*, 21 U.C.L.A.L. Rev. 600 (1973).

Whatever the merits of such arguments, we are not free to adopt them. Some years ago, our legislature made the judgment that imposing such liability on organizations or associations involved in a labor dispute is against the public policy and would tend to the destruction of labor unions, a fate to be avoided. We are bound by the judgment of the legislature on such policy questions unless and until that judgment is changed. We must not engage in judicial legerdemain to undermine a legislative purpose so clearly expressed. Nor should we tinker with detailed statutory enactments that have been largely accepted by our society as necessary to preserve the rights and viability of labor unions, and indeed all parties in a labor dispute.

For the reasons set forth above, the original opinion and order in this case is withdrawn and the judgment of the Superior Court is affirmed.

ZAPPALA, J., files a concurring opinion in which NIX, C.J., joins.

FLAHERTY, J., files a dissenting opinion in which McDERMOTT and STOUT, JJ., join.

ZAPPALA, Justice, concurring.

I concur in the result, and as to the law, the facts, and the application of the law to the acts, I retain the position taken in my concurring and dissenting opinion reported at 515 Pa. 516, 536, 530 A.2d 853, 863.

NIX, C.J., joins in this concurring opinion.

FLAHERTY, Justice, dissenting.

I dissent and would reaffirm this Court's previous decision in this case, on the basis of the opinion authored by the former Mr. Justice Hutchinson. *Gajkowski v. International Brotherhood of Teamsters*, 515 Pa. 516, 530 A.2d 853 (1987).

This opinion joined by McDERMOTT, J. and STOUT, J.

Ronald and Frances GAJKOWSKI, Robert Schipske, and William and Jean Abate, Appellants,

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and Highway Truck Drivers and Helpers Local Union No. 107, Appellees

Supreme Court of Pennsylvania

Argued April 8, 1987.
Decided Aug. 31, 1987.

Application for Reconsideration
Granted Nov. 18, 1987.

Affirmed in part reversed in part,.

Papadakos, J., concurred and filed opinion.

Larsen, J., concurred in part and dissented in part and filed opinion.

Zappala, J., concurred in part and dissented in part and filed opinion in which Nix, C.J., joined.

Gregory T. Magarity, Philadelphia, for appellants.

Thomas W. Jennings, William J. Einhorn, Philadelphia, for appellees.

Richard Markowitz, R. David Walk, Philadelphia, for amicus - Confederation of Teamsters.

Before NIX, C.J., and LARSEN, FLAHERTY, McDERMOTT, HUTCHINSON, ZAPPALA and PAPADAKOS, JJ.

OPINION OF THE COURT

HUTCHINSON, Justice.

Ronald and Frances Gajkowski, Robert Schipske and William and Jean Abate (appellants) appeal by allowance a Superior Court order 350 Pa. Super. 285, 504 A.2d 840 which reversed an order of an *en banc* panel of Bucks County Common Pleas. Appellants brought suit in Common Pleas against appellees, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (IBT) and Highway Truck Drivers and Helpers Local Union No. (107), for damages stemming from a shooting on January 25, 1980 at a plant at which members of Local 107 were on strike and picketing. A jury returned a verdict in favor of appellants. An *en banc* panel of Bucks County Common Pleas affirmed. Concluding that there was insufficient evidence to warrant holding the appellees liable, Superior Court reversed. Our examination of the record, leads us to hold that Superior Court properly exonerated the IBT from liability. However, there is sufficient evidence from which the jury could properly hold Local 107 liable for damages resulting from the shooting. Therefore, we affirm that portion of Superior Court's order relating to IBT and reverse the order relieving Local 107 of liability.

On November 18, 1979, the members of local 107 employed at the Minnesota Mining and Manufacturing Company's (3M) Bristol plant voted to commence a lawful economic strike after rejecting 3M's final offer for a new collective bargaining agreement. After the strike vote, local 107 initiated around-the-clock picketing at the entrance to the Bristol facility. The picketing remained uneventful until January 25, 1980, when Robert Ballinger, a member of local 107, shot Ronald Gajkowski, Robert Schipske and William Abate with a .22 caliber revolver.[1] Gajkowski and Schipske were members of local 107 and Abate was a security guard at the 3M plant. As a result of the shooting, Gajkowski lost his left left eye, Schipske suffered injuries to his nose and Abate sustained severe internal injuries.

Appellants filed a complaint in trespass in Bucks County Common Pleas against local 107 and its parent organization, the IBT. Following a lengthy trial, the jury was instructed on common law negligence principles and the stricter

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[1] At trial, Ballinger denied any responsibility for the shooting although he admitted to police at the scene that he in fact was the perpetrator and later pled *nolo contendre* to the criminal charges.

proof requirements incorporated in Pennsylvania's labor Anti-Injunction Act. Although Common Pleas held that the act's strict limitations on union liability for civil damages did not apply to the facts of this case, the jury was presented with special interrogatories on both theories of liability. The jury found in favor of the appellants on both theories and awarded damages totaling approximately 1.3 million dollars.[2] Common Pleas, sitting *en banc*, denied appellees' post-trial motions seeking arrest of judgment, judgment *non obstante verdicto* or a new trial. Holding that the Labor Anti-Injunction Act applies, Superior Court determined that the appellants offered insufficient evidence to support the verdicts and entered judgment n.o.v. We granted appellants' petition for allowance of appeal because of the important questions raised on union liability under this act for injuries arising out of violence during strikes.

I. INTRODUCTION

Section 8 of Pennsylvania's Labor Anti-Injunction Act, Act of June 2, 1937, P.L. 1198, No. 308, 43 P.S. § 206h (Anti-Injunction Act), sets out both the kind and degree of proof necessary to hold a labor organization liable for the acts of officers, members or agents:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute as herein defined, shall be held responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members or agents, except upon proof beyond a reasonable doubt in criminal cases, and by the weight of evidence in other cases, and without the aid of any Presumptions of law or fact, both of--(a) the doing of such acts by persons who are officers, members or agents of any such association or organization; and (b) actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof by such association or organization.

43 P.S. § 206h. Arising from the troubled labor history which precedes the Great Depression, the act reflects a legislative decision that crippling judgments against labor organizations in unfriendly forums threaten workers' rights to collective bargaining. Anti-Injunction Act, *supra*, §2, 43 P.S. §206b(a). *See*

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[2] The jury apportioned the damage award as follows: Ronald Gajkowski, $589,960; Frances Gajkowski, $62,500 (loss of consortium); Robert Schipske, $12,000; William Abate, $540,000; and Jean Abate, $100,000 (loss of consortium).

also Western Pennsylvania Hospital v. Lichliter, 340 Pa. 382, 387, 17 A.2d 206, 209 (1941). The Pennsylvania statute closely parallels the language of Section 6 of the Norris-LaGuardia Act, 29 U.S.C. §106 (1982), which reflects the same concern.[3] In *Philadelphia Marine Trade Ass'n. v. International Longshoremen's Ass'n*, 453 Pa. 43, 308 A.2d 98 (1973), noting the similarities in the two statutes, we stated that the United States Supreme Court's interpretation of Section 6 of the Norris-LaGuardia Act offers guidance in our construction of Section 8 of the Anti-Injunction Act. Examination of the myriad of opinions of other state and federal courts in this area also offers insight into the competing policy considerations in this area of labor relations.[4]

The background of Section 6 of the Norris-LaGuardia Act was explored in *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 67 S.Ct. 775, 91 L.Ed. 973 (1947). There, the Court held that the due language of the Norris-LaGuardia Act precludes the employment of either standard agency or *respondeat superior* analysis to hold a union vicariously liable for the torts of its officers, members and agents;

> We hold, therefore, that "authorization" as used in § 6 means something different from corporate criminal responsibility for the acts of officers and agents in the Course or scope of employment. We are of the Opinion that the requirement of "authorization" restricts the responsibility or liability in labor disputes of employer or employee associations, organizations or their members for unlawful acts of the officers or members of those associations or organizations, although such officers or members are acting within the scope of their general authority as such officers or members, to those associations, organizations or their officers or members who actually participate in the unlawful acts, except upon clear proof that the particular act charged, or acts generally of that type and quality, had

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[3] That section reads:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

29 U.S.C. § 106.

[4] The United States Supreme Court has long held that the state courts have jurisdiction over labor matters involving violence and threats to public order. *See, e.g., United Constr. Workers v. Laburnum Constr. Corp.*, 347 U.S. 656, 74 S.Ct. 833, 98 L.Ed 1025 (1954) (state court not precluded from determining common law tort based on threats of violence and intimidation).

been expressly authorized, or necessarily followed from a granted authority, by the association or non-participating member sought to be charged or was subsequently ratified by such association, organization or member after actual knowledge of its occurrence.

Id. at 406-407, 67 S.Ct. at 781 (footnote omitted). Following *United Brotherhood of Carpenters*, Congress provided a right of action for money damages in certain labor disputes in Section 303(b) of the Labor Management Relations Act, 29 U.S.C. § 187(b) (1982).[5] In *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed. 2d 218 (1966), the Court compared Section 303(b) of the Labor Management Relations Act with Section 6 of the Norris-LaGuardia Act and stated that "the responsibility of a union for the acts of its members and officers [under § 903] is to be measured by reference to ordinary doctrines of agency, rather than the more stringent standards of § 6 [of the Norris-LaGuardia Act]." *Id.* at 736, 86 S.Ct. at 1144. Thus, it is clear that both Section 6 of the Norris-LaGuardia Act and Section 8 of the Pennsylvania Anti-Injunction Act require a higher showing than the common law rules of agency. *See Dow Chemical Co. v. International Union of Elec., Radio & Mach. Workers*, 480 F.2d 433, 437 (5th Cir.1973), *cert. denied*, 415 U.S. 932, 94 S.Ct. 1444,39 L.Ed.2d 490 (1974); Note, *Union Responsibility for Acts of Officers and Members*, 63 Harv.L.Rev. 1035, 1039 (1950).[6]

[1] In an effort to avoid the difficult proof requirements of Section 8, appellants proffer two arguments, neither of which is persuasive. First, appellants contend, and Common Pleas agreed, that the legislature, through the adoption of Section 8, did not intend to supplant common law agency principles in personal injury matters. They argue that the statute was designed to protect unions solely from suits for economic damages stemming from a labor dispute.

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[5] 29 U.S.C. § 187(b) states:

(b) Whoever shall be injured in his business or property by reason or any violation of subsection (a) [relating to unfair labor practices by a labor organization] of this section may sue therefor in any district court of the United States subject to the limitations and provisions of section 185 of this title without respect to the amount in controversy, or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

[6] *See generally* Note, *Labor Unions - Vicarious Liability for Torts Committed by Members*, 57 Wash. L.Rev. 193 (1981); Comment, *The Liability of Labor Unions for Picket Line Assaults*, 21 UCLA L.Rev. 600 (1973); Note, *Tort Liability of Labor Unions for Picket Line Assaults*, 10 U. Mich.J. L.Ref. 517 (1977); Annotation, *Liability of Labor Union or its Membership for Torts Committed by Officers, Members, Pickets, or Others, in Connection with Lawful Primary Labor Activities*, 36 A.L.R.3d 405 (1971).

We do not agree. Protecting unions from damage awards which would impinge upon the collective rights of workers is the clear import of Section 8. *Supra* at 855. The protection is available regardless of the theory that the plaintiff pursues. The purpose of this section's higher standard of proof in civil actions is the protection of the worker's right to collective bargaining without exposing his union to the higher costs engendered by the agency notion of *respondeat superior*. Since the union generally has no pool of profits with which to withstand the impact of unanticipated and costly damage awards, it could well be destroyed by an inadequately established claim.

[2] Second, appellants argue that Section 4 of the act serves to remove all acts of violence from the strictures of the Anti-Injunction Act. Since their cause of action is predicated upon a series of violent acts, they contend, the unique proof requirements of Section 8 do not apply. Section 4(d) of the act states:

> No court of this Commonwealth shall have jurisdiction to issue any restraining order or temporary or permanent injunction in a case included within this act, except in strict conformity with the provisions of this act, nor shall any such restraining order or temporary or permanent injunction be issued contrary to the public policy declared in this act. Exclusive jurisdiction and power to hear and determine all actions and suits coming under the provisions of this act, shall be vested in the courts of common pleas of the several counties of this Commonwealth: Provided, however, That this act shall not apply in any case--
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> (d) Where in the course of a labor dispute as herein defined, an employee, or employes acting in concert, or a labor organization, or the members, officers, agents, or representatives of a labor organization or anyone acting for such organization, seize, hold, damage, or destroy the plant, equipment, machinery, or other property of the employer with the intention of compelling the employer to accede to any demands, conditions, or terms of employment, or for collective bargaining.

43 P.S. § 206(d). Appellants argue that the language "this act shall not apply in any case," coupled with the prohibition against violence in Section 4(d), 43 P.S. § 206d(d), prevents the use of Section 8 of the Act in cases involving violent acts. Careful scrutiny of Section 4, 43 P.S. § 206d, reveals that subsections (a) through (d) were added to the Act of June 2, 1937, P.L. 1198,

No. 308, by the Act of June 9, 1939, P.L. 302, No. 163. Prior to that amendment, Section 4 concluded with the word "Commonwealth" immediately before the proviso. Subsection (d) was added to restore to a chancellor the power to enjoin a violent labor dispute. The subsection does not abrogate the protections afforded in Section 8 which apply to any organization or association "in any civil action at law or suit in equity." Anti-Injunction Act, *supra*, § 8, 43 P.S. § 206h. It does not apply to actions at law for damages. An injunction poses no threat to the viability of a labor organization when as damage awards may quickly strangle the entity responsible for bargaining on behalf of workers. Hence, in amending the original act in 1939, the legislature retained the original higher standard of proof for damage actions. The 1939 amendment was intended to insure that an injunction will quickly issue when required to calm a heated and violent labor dispute. *Link Belt Co. v. Local 118 American Federation of Technical Eng'rs*, 415 Pa. 122, 202 A.2d 314 (1964). Regarding the limited impact of the 1939 amendments, we stated in *Link Belt*:

> Section 4, as originally drafted, deprived our courts of jurisdiction to grant injunctions in labor disputes except as provided elsewhere in the Act. The proper and logical section for amendment to create exceptions to that limitation of jurisdiction is Section 4. *The balance of the Act remain in full effect in those situations covered by the jurisdictional section.*

Link Belt, *supra* at 128, 202 A.2d at 317 (emphasis added).

This distinction is also sound from the standpoint of policy. A union qua union can have no legitimate interest in preventing an injunction against violence on the picket line, whether or not it participated in fomenting that violence. If it did, it is properly a party. If it did not, it should support an end to the violence as all good citizens are required to do. On the other hand, a civil suit for damages against a union which did not participate or foment unlawful acts by its members can destroy or severely cripple a union which has taken no part in its members' unlawful acts. Therefore, to permit such suits without proof of actual participation strikes at the core of the act's policy of protecting unions as entities from adverse consequences arising from acts in which they did not participate. With these general principles in mind, we now turn to the facts of the case *sub judice*.

II. PARTICIPATION OF LOCAL 107

[3-5] For a labor organization to be liable for "participation" pursuant to Section 8 of the Anti-Injunction Act, a jury must find that (1) the acts were

committed by officers, members or agents of the organization and (2) the organization actually participated in the acts. Such a finding must be predicated upon clear proof. *Philadelphia Marine*, *supra* at 453 Pa. 52, 308 A.2d at 103 (*quoting Gibbs, supra*). It is beyond question that the major players in this tragedy were members of Local 107. The difficult question is whether the entity itself, local 107, "participated" in the drama and so is liable to compensate the victims. A finding of participation may be based upon circumstantial evidence. *Ritchie v. United Mine Workers*, 410 F.2d 827, 833 (6th Cir. 1969). *See also James R. Snyder Co. v. Edward Rose & Sons*, 546 F.2d 206, 209 (6th Cir. 1976) (proof of authorization or ratification can be based upon circumstantial evidence). In determining whether a labor organization has actually participated in the commission of an act, we hold that the number of persons involved, the status of these persons in the organization, and whether the organization was aware of and in a position to exercise control over the acts, are all relevant considerations. *See United Aircraft Corp. v International Association of Machinists*, 161 Conn. 79, 89, 285 A.2d 330, 337 (1971), *cert. denied*, 404 U.S. 1016, 92 S.Ct. 675, 30 L.Ed.2d 663 (1972). This record shows clear proof of local 107's participation in the sorrowful events of January 25, 1980, a participation for which it should be condemned and held accountable to those injured. Therefore, Superior Court erred in granting judgment n.o.v. the favor of the appellee, local 107.

At this point, an exacting review of the 1,113 page trial transcript is necessary. The following people were primary participants in this tragedy. At the time of the strike and shooting, Joseph Cimino was president of Local 107. John Smalley was a business agent/recording secretary of the local and chief negotiator in the ongoing discussions with 3M. Mr. Smalley was, according to his own testimony, responsible for control of the picket line. N.T. February 28, 1984 at 371. William Crossan was an employee of 3M, the local union's chief steward and a member of its negotiating committee. Robert Kendig was a union steward and employee at the Bristol plant and also a member of the negotiating committee. Robert Ballinger was an employee of 3M, a member of local 107 and the individual who fired the pistol, injuring fellow picketers Gajkowski and Schipske and 3M security guard Abate.

Although pulling the trigger was the physical act of one intoxicated picketer, there is sufficient evidence from which the jury could properly hold that local 107 participated in the calamity of January 25. On that fateful day, Crossan, Kendig, Ballinger and two others went to the "Tulleytown Tank" for lunch. Crossan stated that the men "drank continuously" for a couple of hours. *Id.* at 424. Upon their return to the line, Crossan and Kendig began

handing out leaflets to non-striking employees. *Id.* at 425. 3M security supervisor Joseph Boxmeyer asked Crossan and Kendig to stop doing this on 3M's property. N.T. February 29, 1984 at 79-81. Kendig went on to let air out of the tires of cars on the 3M lot. N.T. February 28, 1984 at 429; February 29, 1984 at 81. Later, Crossan and Kendig left in Kendig's truck, ostensibly to check on Kendig's children. Before leaving, a striker overheard Kendig remark that he was going to get a gun to shoot out 3M's lights and security camera. N.T. February 28, 1984 at 195. At Kendig's house, both Crossan and Kendig had a shot of alcohol before coming back to the line. While they were riding back to the plant, Kendig showed Crossan a gun he was storing in the truck. Crossan made no objection to Kendig's bringing the gun on the line. N.T. February 28, 1984 at 432-434.

Kendig took the gun into the strike trailer across the street from 3M's property. Strikers were assembled in the trailer playing cards. Kendig displayed the gun to all present and exclaimed "deal me in." N.T. February 27, 1984 at 121. At this, Kendig laughed and left the trailer. *Id.* at 122. The record is filled with evidence that large amounts of alcohol were consumed on the line that evening. *Id.* at 110, 113, 115; February 28, 1984 at 175, 177. Ballinger, who would later fire the injurious shots, was described by a number of witnesses as drunk. N.T. February 27, 1984 at 118; February 28, 1984 at 182. Soon, rocks and bottles were being thrown at the plant. N.T. February 27, 1984 at 126. Two witnesses credited Kendig with throwing the first bottle and shouting, "This will get something started." *Id.*; N.T. February 28, 1984 at 292. George Cook, the picket line captain, testified that he had been drinking and took part in throwing the rocks and bottles. N.T. February 28, 1984 at 275-76. One bottle went astray and hit Ballinger on the head. N.T. February 27, 1984 at 128; February 28, 1984 at 252.

The once peaceful picket line deteriorated into a raucous mob. One witness described the growing tension and two witnesses characterized the situation as "rowdy." N.T. February 27, 1984 at 130; February 28, 1984 at 190. Joseph Boxmeyer, 3M's security head, noted in his log that the picketers were attempting to create a confrontation through their actions. N.T. February 29, 1984 at 85; Plaintiffs' Exhibit No. 59. Some time after 7:00 P.M., one picketer and an employee of 3M reported shots. N.T. February 27, 1984 at 134; Plaintiffs' Exhibit No. 36. Crossan then met Kendig near the gas station across the street from the plant; Kendig handed Crossan the pistol and urged Crossan to shoot out the lights at the plant. Crossan replied, "I don't know how." Kendig offered to instruct him; Crossan decided to go to the men's room. N.T. February 28, 1984 at 434-35. He admitted that he did not attempt to restrain

Kendig or contact Smalley. *Id.* at 436. After Crossan departed, Kendig met up with Ballinger and Ballinger fired the shots from Kendig's gun which injured appellants.

Jack Smalley, business agent for Local 107, testified that he was responsible for the conduct of the strike at the Bristol 3M plant. N.T. February 28, 1984 at 371. He asserted that Local 107 had a rule against drinking alcoholic beverages on the picket line. *Id.* at 376, 379. At least four witnesses testified there was no such rule. N.T. February 27, 1984 at 110; February 28, 1984 at 236, 241, 273. Smalley stated that he was aware of drinking on the line but admitted he took no steps to curb it. *Id.* at 388-390. George Cook testified that on one occasion he observed George Massimini, another business agent of Local 107, delivering alcoholic beverages to the strikers. *Id.* at 279-80.

This record reveals a dangerous combination of escalating tensions, alcohol and firearms. The firing of the pistol at the three victims was not the act of a lone perpetrator but the end result of a collective assault on the 3M plant. The passing of the weapon among union officials responsible for the negotiating process is sufficient to hold Local 107 liable as a participant. *See, e.g., Charles D. Bonanno Linen Service v. McCarthy*, 708 F.2d 1, 11-12 (1st Cir. 1983) (imposition of liability on union where union representative, vested with authority to control violence, failed to act), *cert. denied*, 464 U.S. 936, 104 S.Ct. 346, 78 L.Ed.2d 312 (1983). *See also NLRB v. Brewery and Beer Distrib. Drivers*, 281 F.2d 319. 321-22 (3d Cir. 1960) (court deems authority of stewards comparable to that of factory foremen); Evans, *The Law of Agency and the National Union*, 49 Ky.L.J. 295, 314 (1961) (discusses authority of stewards as bottom link in chain of union command). The record shows that many strikers, with varying degrees of authority, were aware of the pistol on the line.[7] No one used his authority to remove it or stop the drinking. Business agent Smalley's failure to do anything is not only a failure of personal responsibility but a failure by the union which gave him that responsibility. From it, the jury could properly infer the "knowing tolerance" of violence held actionable under the Norris-LaGuardia Act by the United States Supreme Court in *Gibbs, supra* 383 U.S. at 739, 86 S.Ct. at 1145-46. Knowing tolerance finds no greater excuse in Pennsylvania. Our legislature did not intend Section 8

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[7] Appellees' argument, that the stewards enjoyed no real authority with the expiration of the collective agreement, is specious. Even assuming *arguendo* that the stewards' authority ended with the expiration of the contract, these stewards, Crossan and Kendig, assumed new authority as members of the negotiating committee bargaining on behalf of the striking employees.

of the Pennsylvania labor Anti-Injunction Act to countenance total abdication of union responsibility for deadly violence in tense labor situations. There is a time when those who have accepted responsibility from their fellow workers for advancing the collective good cannot look the other way while irresponsible men openly foment violence which injures people and hauls the labor movement into disrepute.

This record also includes circumstantial evidence that Joseph Cimino, president of Local 107, sanctioned the assault on the Bristol plant. Three days prior to the events of January 25, Cimino attended a meeting at the Washington, D.C. office of the IBT to discuss a number of unresolved issues. Present were Cimino, Norman Weintraub, an IBT economist, Joseph Cotter, an IBT staff employee, Nelson Schmidt, a 3M attorney, and Robert Hanson, a 3M personnel manager. At the conclusion of the meeting, Cimino and Hanson agreed to re-evaluate their positions during a follow-up phone call. Mr. Hanson's notes, introduced into evidence by stipulation, reveal the content of his conversation with Cimino on January 25, the day of the melee:

> Joe Cimino called me answering my call to Cotter. Summary of conversation: We need all 13 items I gave you yesterday. People are adamant and strong. I've spent a lot of time on picket line. They won't go back to work for a few cents. I've got to represent them. We're going to extend our picketing. I've got approval from the Intl. *We're going to do what we have to do --it's been peaceful for ten weeks--it's getting hot now--they are uptight-- we've got to get mgmt's attention.* I have no malice--I won't lie to you or sandbag you. These people don't like being 2nd class citizens--they compare rates and benefits with St. Paul, and other three plants & don't like being behind. Everybody has sick days these days. You get injunction & then tell us where you're shipping all boxcars--it's written on cars "To Anchor" or "To Leno"--that's really rubbing salt in wounds. First time they're doing it. We're have a demonstration Mon. in Phil.--95% of 3M will be there and some truck drivers.

Plaintiff's Exhibit No. 28 (emphasis added).[8] The appellees contend that Mr. Cimino's statement refers to legitimate efforts to extend the picketing to other

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[8] Mr. Cimino's statement is probative on the issue of whether he "participated" in the violence at the Bristol plant. The statement could also be considered as indicative of Local 107's "authorization" of the shooting. However, as circumstantial evidence, we do not believe that this statement alone is clear proof of Local 107's "authorization" of the tragic events of January 25.

3M facilities and a rally to be held in Philadelphia to demonstrate support for local 107. Whether Cimino's comments refer to the violence of January 25 or to the proposed legitimate efforts to pressure 3M was for the jury to decide.

[6,7] Because Common Pleas properly instructed the jury on the applicability of the labor Anti-Injunction Act through the use of special interrogatories, our review is limited to a determination of whether there is sufficient evidence on which to base the jury's verdict. *Burbage v. Boiler Eng'g. & Supply Co.*, 433 Pa. 319, 323, 249 A.2d 563, 566 (1969). Our system vests the responsibility of determining the facts with the jury and we will not upset their findings absent a showing that the verdict is capricious, against the weight of the evidence and resulted in a miscarriage of justice. *Simon v. H.K. Porter Co.*, 407 Pa- 359, 363, 180 A.2d 227, 229 (1962). We are particularly reluctant to disturb a verdict which is supported by both the trial court and a panel of that court sitting *en banc*. *Skoda v. West Penn Power Co.*, 411 Pa. 323, 338, 191 A.2d 822, 830 (1963); *Roadman v. Bellone*, 379 Pa. 483, 491, 108 A.2d 754, 758 (1954).

Our detailed factual recital shows that there is evidence on this record sufficient for a jury to determine that enough of the membership of Local 107 and of its officers took part in the tragic events of January 25 to hold the Local liable as a participant for the appellants' damages. The principal players include stewards serving as agents on the negotiating committee, officers and a host of members of the Local. The record bespeaks rising tensions, fueled by alcoholic beverages, that reached a violent crescendo on the evening of January 25, without any responsible effort to avert it. Considering the evidence which the jury had when it held Local 107 liable, we see no reason to disturb that verdict.

III. PARTICIPATION OF THE IBT

[8] While the record is full of evidence from which the jury properly inferred the participation of Local 107 in the January 25 violence, there is no clear proof of either actual participation or actual authorization by the IBT. At trial, appellants sought to demonstrate, through the introduction of copies of the constitutions of the two organizations, that the local is the agent of the parent and therefore jointly liable for the harm. This effort to demonstrate an agency relationship was buttressed by evidence of strike benefits paid from the IBT to local members. Also, appellants proffered evidence of a parade held in Philadelphia three days after the shooting; however, there was absolutely no showing that the officers of the IBT sanctioned this event as a demonstration

of support of the violence of January 25. This showing falls well short of the clear proof of actual authorization or actual participation called for in Section 8. *Cf. Riverside Coal Co. v. United Mine Workers*, 410 F.2d 267 (6th Cir. 1969) (parent union's agents actually involved in violence), *cert. denied*, 396 U.S. 846, 90 S.Ct. 89, 24 L.Ed.2d 95 (1969). Indeed, this is precisely the situation in which the legislature intended to protect a union from the imposition of liability through its enactment of Section 8. Appellants' evidence could demonstrate a common law agency relationship. This is insufficient under the statute. While fears of strangling new unions may seem to have little relevance in the context of today's large and powerful national bodies, a change from participation to *respondeat superior* as the basis for union liability is a decision for the legislature, not the courts.

The day-to-day functions of a labor organization will not evidence liability for tortious conduct. For example, a number of courts have held that the payment of routine strike benefits alone does not give rise to liability under Section 6 of the Norris-LaGuardia Act. *Gibbs, supra* 383 U.S. at 738, 86 S.Ct. at 1145; *Federal Prescription Serv. v. Amalgamated Meat Cutters*, 527 F.2d 269, 276-77 (8th Cir. 1975). Absent a showing that the IBT took affirmative steps to either sanction or take part in the events of January 25, Superior Court properly exonerated the organization from any liability.

Based on the foregoing, the order of Superior Court is reversed with regard to Local 107. It is otherwise affirmed.

PAPADAKOS, J., joins in this opinion and files a concurring opinion.

LARSEN, J., files a concurring and dissenting opinion.

ZAPPALA, J., files a concurring and dissenting opinion in which NIX, C.J., joins.

PAPADAKOS, Justice, concurring.

I join with the Majority, but write separately to express my deep concern over the lack of any challenge to the awards for loss of consortium. Frances Gajkowski was awarded $62,500.00 for the temporary loss of her mate's sexual favors and for a temporary diminishment in the society and services he rendered her. Jean Abate was awarded $100,000.00 for the same temporary losses. I do not understand why defendants would stand mute before the appellate

courts on these matters. Perhaps they know more than the record reflects. In any event, I decry the fact that this matter cannot be reached by the Court.

LARSEN, Justice, concurring and dissenting.

I agree with the majority that the evidence falls well short of the required proof of actual participation in or authorization of the tragic events of January 25, 1980 on the part of appellee, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (IBT). Accordingly, I concur in affirming the order of the Superior Court absolving IBF from any liability.

I, however, dissent to the majority's finding that "there is sufficient evidence from which the jury could properly hold that [appellee, Highway Truck Drivers and Helpers Local Union No. 107] participated in the calamity of January 25." (Opinion, p. 858.) There is no dispute that the quality of proof required to hold a labor organization, in this case Local 107, liable for the acts of its officers, members or agents is governed by Section 8 of the Pennsylvania Labor Anti-Injunction Act of June 2, 1937, P.L. 1198, No. 308, 43 P.S. § 206h (Anti-Injunction Act). Section 206h of the controlling Act provides:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute as herein defined, shall be held responsible or liable in any civil action at law or suite in equity or in any criminal prosecution for the unlawful acts of individual officers, members or agents, except upon proof beyond a reasonable doubt in criminal cases, and by the weight of evidence in other cases, and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization; and (b) actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof by such association or organization. 1937, June 2, P.L. 1198, § 8.

The majority correctly observes that in *Philadelphia Marine Trade Association v. International Longshoremen's Association*, 453 Pa. 43, 308 A.2d 98 (1973) we noted that Section 206h of the Anti-Injunction Act is patterned after § 6 of the Norris-LaGuardia Act, 47 Stat. 71, 29 U.S.C. § 106 which provides as follows:

> No officer or member of any association or organization and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.

Mar. 23, 1932, c. 90 § 6. In *Philadelphia Marine Trade Association* we stated:

> As the United States Supreme Court said in discussing that section in its opinion in the case of *United Mine Workers of America v. Gibbs*, 383 U.S. 715 [86 S.Ct. 1130, 16 L.Ed.2d 218] (1966), quoting its opinion in *Brotherhood of Carpenters v. U.S.*, 330 U.S. 395, 403 [67 S.Ct. 775, 780, 91 L.Ed. 973] (1947): "... whether § 6 should be called a rule of evidence or one that changes the substantive law of agency ... its purpose and effect was to relieve organizations ... and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration."
>
> We believe that § 206h of the Pennsylvania Labor Anti-Injunction Act was intended to have the same purpose as § 6 of the Norris-LaGuardia Act.

Id. at p. 52, 308 A.2d at 103.

The majority in holding there is clear proof that Local 107 participated in the dire events of January 25, 1980, points to the following evidence: (a) that William Crossan, Robert Kendig and Robert Ballinger along with two other strikers were at lunch that day for two hours and during that time they "drank continuously"; (b) that Kendig let air out of automobile tires in the 3M parking lot; (c) that Kendig and Crossan went to Kendig's home to check on his children and while there Kendig got a gun to bring back to the picket line; (d) that Crossan did not object to Kendig bringing the firearm on the picket line; (e) that Kendig was a shop steward; (f) that Crossan was a chief steward; (g) that alcoholic beverages were consumed in some quantity on the picket line that day; and, (h) that George Massimini, a union business agent, was seen delivering alcoholic beverages to the strikers on the picket line.

Although these activities are objectionable and inconsistent with sensible picket line conduct, they hardly constitute "clear proof" that Local 107 participated in or authorized the deplorable gunfire that injured the appellants. The shooting on January 25, 1980 was an isolated act of two members of the local union (Ballinger and Kendig) which occurred after ten consecutive weeks of peaceful and lawful picketing. To hold that there is "clear proof" that Local 107 participated in this senseless shooting, as the majority does, is to torture the evidentiary standard of Section 206h. I would affirm the entire order of the Superior Court.

ZAPPALA, Justice, concurring and dissenting.

As does Justice Larsen, I agree with the majority that the evidence is insufficient to establish liability of IBT, but depart from its holding that there was sufficient evidence from which the jury could find Local 107 liable for damages arising from the shooting. Although the majority concludes that Section 8 of the Pennsylvania Anti-Injunction Act requires a greater burden of proof than that required under the common law rules of agency to establish the liability of a union for the acts of its members and officers, it quickly abandons this requirement on the particular facts of the case.

The majority heavily emphasizes the status of William Crossan and Robert Kendig as union stewards and members of the negotiating committee, and their involvement in the shooting incident, in arriving at its conclusion that the evidence was sufficient to hold Local 107 liable as a participant. The uncontroverted evidence repudiates the majority's implication that the status of these two individuals as stewards and negotiating committee members was such that their conduct could be sufficient to establish that Local 107 actually participated in the acts. Neither of these positions vested authority in those individuals to control the picket line; yet, the majority presumes such authority existed, stating "No one used his authority to remove [the pistol] or stop the drinking." [Majority Opinion at 17.] Contrary to the expansive responsibilities imagined by the majority to exist in one who held those positions, a steward's only responsibility was the processing of grievances. R. 461a, 475a. This function had significance only as long as the collective bargaining agreement was in effect.

In order to perfect its premise, the majority finds that Crossan and Kendig, as members of the negotiating committee, were imbued with "new authority." This finding is the entire underpinning of the majority's theory of liability as it relates to Local 107. Without evidence that Crossan and Kendig were

responsible for supervising the conduct of the striking workers while on the picket line, their actions are not a proper predicate for establishing liability of Local 107. The record demonstrates that as members of the negotiating committee, Crossan and Kendig simply acted as sources of information relative to the progress of the negotiations. R. 447a, 476a. No actual participation in the violence, or authorization, by the union is established simply by showing that members who happened to be on the negotiating committee were involved in acts of violence.

The acknowledged purpose of the higher standard of proof required in this particular type of litigation is to protect the workers' right to collective bargaining without exposing the union to greater costs resulting from the application of an agency concept of *respondeat superior*. The majority lauds the purpose, only to defeat it by misrepresenting the import of the cases on which it relies. It seizes on isolated phrases without any reference to the context in which they were originally used. This is especially disingenuous where the language now given *broader* application by this indiscriminate use was first employed to demonstrate the *more stringent* proof requirements of the legislation.

This is demonstrated by the majority's reliance on *Charles D. Bonanno Linen Service v. McCarthy*, 708 F.2d 1 (1st Cir. 1983), *cert. denied*, 464 U.S. 936, 104 S.Ct. 346, 78 L.Ed.2d 312 (1983), and *NLRB v. Brewery and Beer Distrib. Drivers*, 281 F.2d 319 (3rd Cir. 1960) to bolster its finding of liability. The majority's reliance on *Brewery and Beer Distrib. Drivers* is unpersuasive because the court noted therein that the record was devoid of any evidence to establish the scope of authority the stewards had in representing the union and that no constitution or by-laws of the union defining such authority were submitted into evidence. That court premised its finding that the stewards had acted within the scope of their authority on clear evidence demonstrating a course of conduct.[9] Different individuals holding the office of steward at various places of business had engaged in similar conduct. In the instant case, the evidence was undisputed that the responsibility of the stewards was limited to representing union members in grievance proceedings. No course of conduct similar to that in *Brewery and Beer Distrib. Drivers* was established.

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[9] It was found that its stewards had encouraged employees of neutral distributors not to load beer orders of members of the complaining association unless they had entered into an agreement made between the union and another distributors association.

Following its statement that "[t]he passing of the weapon among *union officials responsible for the negotiating process* is sufficient to hold Local 107 liable as a participant." (emphasis added), the majority cites to *Bonanno* for the proposition that liability could be imposed where a union representative with authority to control violence, failed to act. However, *Bonanno* reinforces only one premise of the majority's syllogism. The deficiency of the majority's logic is that the facts in this case do not support the same premise. In *Bonanno*, there was an indisputable breach of responsibility to control violence. When the company had first requested an injunction against the union, its representative "promised the court he would control the pickets," *Id.* at 11, and the court refused the injunction. After the violence, a restraining order was issued on the court's finding that the representative who had the power and authority to control the violence had deliberately failed to deliver on his promise. Indeed, in an earlier opinion in the case the court noted that the representative had given approval for one of those subsequent acts of violence. *Charles D. Bonanno Linen Service, Inc. v. McCarthy*, 532 F.2d 189, 191 (1st Cir. 1976).

Bonanno does not provide proper support for the majority's leap from the statement that the union officials were involved in the negotiating process to the conclusion that they had the power and authority to control the picket line. Although the court in *Bonanno* made this point, it did so by taking out of context a statement by the Supreme Court in the seminal case interpreting the Norris-LaGuardia Act, *United Brotherhood of Carpenters v. United States*, 330 U.S. 395, 67 S.Ct. 775, 91 L.Ed. 973 (1947). The Court did say that "[t]he grant of authority to an officer of a union to negotiate agreements with employers . . . may well be sufficient to make the union liable." *Id.* at 410, 67 S.Ct. at 783. The illegal act for which the union was sought to be held criminally liable in that case, however, was entering into a contract that violated the Sherman Act. If the purpose of the more stringent proof required by the act is to protect "unions as entities from adverse consequences arising from acts in which they did not participate," Majority Opinion at 11, there is nothing unusual in finding union participation in an antitrust violation where its representative, with authority to enter a contract, entered a contract that was in fact illegal. "[T]he particular act charged, or acts generally of that type and quality, had been expressly authorized, or necessarily followed from a granted authority." *Id.* at 406-07, 67 S.Ct. at 781. The entire stated purpose is defeated, however, if it can be assumed, as the majority does here, that a member given authority to negotiate on behalf of strikers thereby has control over all acts of the strikers and bears responsibility for them.

A final egregious example is the reference to *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966). The majority refers

to the business agent's overall responsibility for the control of the picket line and states that from his failure to act "the jury could properly infer the 'knowing tolerance' of violence held actionable under the Norris-LaGuardia Act . . . in *Gibbs*." The majority leaves the inference that business agent Smalley was present at the picket line and aware of the presence of the gun, but the record demonstrates that he was not. This point is significant in understanding the misuse of the phrase "knowing tolerance" taken from *Gibbs*.

In *Gibbs*, a dispute between a UMW local and a rival union over the organizing of a coal mine being newly opened had resulted in threats to Gibbs, a mine supervisor, and the beating of an organizer for the rival union by armed members of the UMW local. The UMW international union set a representative, who established a limited picket line at the mine and instructed against further violence. The picket line remained for nine months without incident, and the mine was never opened.

Gibbs, who also had a contract to haul coal from the mine, lost his job as superintendent and, obviously, was never able to perform on his haulage contract. He sued the local and the international unions alleging that their conduct constituted secondary boycotts in violation of § 303 of the Labor-Management Relations Act, along with other state law claims, causing these injuries to his business. The only claim found to be supported by the evidence or cognizable by the federal court was the state law claim for interference with the employment relationship. Awards against the local and international unions were affirmed by the Circuit Court, and only the international was a petitioner in the matter before the Supreme Court.

The Court first made the point that the international could not be said to have ratified the threats and violence that had occurred merely by involving itself in the dispute on the side of the Local after the fact. It was in the context of establishing this point that the Court used the phrase "knowing tolerance." Specifically, the Court stated

> [w]hat is required is proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in *further acts* which were in themselves actionable under state law or intentionally drew upon the previous violence for their force.

383 U.S. at 739, 86 S.Ct. at 1146 (emphasis added). The Court gave clear indication of the meaning of this passage when it later stated that "[t]he relevant question . . . is whether . . . UMW representatives were clearly shown to have

endorsed violence or threats of violence as a means of settling the dispute." *Id.* at 741, 86 S.Ct. at 1147.

In this case, we see a single act of violence, clearly without purpose in regard to the labor dispute (two of the three persons injured were striking workers and the third was a security guard whose continued work gave neither advantage nor disadvantage to the company or the union in the contract negotiations). Both before and after the incident the picket line was peaceful. It is beyond my comprehension how it can be said that a Local 107 business agent, who was not present at the scene, (and through him the union Local) can be said to have "knowingly tolerated" the presence of the gun, let alone the violence. He neither knew of it, nor tolerated it.

By misrepresenting the facts and distorting the law, the majority destroys the legislation's salutary purpose--the protection of employees' power to bargain collectively. From this, I must dissent.

NIX, C.J., joins in this concurring and dissenting opinion.

Ronald J. and Frances GAJKOWSKI

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and Highway Truck Drivers and Helpers Local Union No. 107, Appellants.

Ronald SCHIPSKE

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and Highway Truck Drivers and Helpers Local Union No. 107, Appellants.

William and Jean ABATE

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA and Highway Truck Drivers and Helpers Local Union No. 107, Appellants.

Superior Court of Pennsylvania.
Argued April 3, 1985.
Filed Jan. 28, 1986.

Thomas W. Jennings, Philadelphia, for appellants.

Gregory T. Magarity, Philadelphia, for appellees.

Before CAVANAUGH, OLSZEWSKI and HOFFMAN, JJ.

CAVANAUGH, Judge:

The International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (IBT or union) and Highway Truck Drivers and Helpers Local Union No. 107 (Local 107 or union) appeal from the denial of post-verdict motions which sought a new trial or judgment N.O.V. The motions were filed following a bifurcated liability and damage trial at which the jury first found in favor of all appellees and, thereafter, awarded damages for personal injuries and loss of consortium to the three injured claimants, Francis Gajkowski, Ronald Schipske and William Abate, and the spouses of Abate and Gajkowski.[1] Numerous issues are raised on appeal. Since we decide that there was insufficient evidence to support the verdicts against either appellant, we reverse and enter judgment N.O.V.

This case arises out of a tragic incident which occurred on January 25, 1980 at the site of the Minnesota Mining and Manufacturing Co. (3M) facility in Bristol Township, Bucks County, Pennsylvania. On that date, in the evening hours, the appellees received bullet wounds from a .22 caliber revolver which was apparently fired by one Robert Ballinger. Ballinger, Gajkowski and Schipske were all employees of 3M and members of Local 107 who were involved in a strike action against 3M. Abate was a security guard in the active employment of 3M and was not a member of Local 107. Suit was brought against the appellant unions on the basis that the shootings were the result of the negligence of the unions in failing to control the picket line. Appellants defended on the grounds, *inter alia*, that the right to recovery was delimited by provisions of the Pennsylvania Labor Anti-Injunction Act, 43 P.S. § 206h; that there is no duty in the unions to control the picket line so as to form the basis for appellees' action in tort; and that the shooting was unforeseeable and beyond the ambit of the unions' responsibility. In order to grasp the thrust of appellees' claim at trial it is first necessary to review the evidence and to examine the competing arguments which arose.

Local 107 is a union which represents some 400 to 500 employees of 3M in twelve departments at 3M's Bristol, Pennsylvania plant. Local 107 and its parent affiliate IBT are both unincorporated associations. On November 18, 1979 the members of Local 107 at 3M voted to reject a "final" company offer and to commence a lawful economic strike on the next day. This was just short of ten weeks before the shooting episode. The union commenced picketing the next day, and continued doing so on a daily basis around the clock. It is

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[1] The total damage awards exceeded 1.3 million dollars.

clear from the evidence that during the course of this extended strike, the picket line operation was essentially incident free. Numerous witnesses attested to the fact that the picketing was "peaceful" and even "friendly" in its operation. During this period, 3M did not seek any injunctive relief to limit the number, location or manner of picketing. There was, however, evidence that picketers had engaged in drinking alcoholic beverages while on picket duty and that this was against union policy and instructions. Nevertheless, there was no evidence that the drinking led to any serious incidents, at least until the night of the shooting.

On January 25, 1980, Officer Stephen Whiteman of the Bristol Township Police Department was on duty and as was his practice, he routinely checked the picket site. There had been some reports of bottle throwing and other misconduct during the evening but when he checked the scene at 8:30 P.M. he found no problems to be present. It was, however, only minutes later that he was called back and discovered that Schipske and Gajkowski had been shot. He found them lying in a driveway. Abate had also been shot and was found on the floor in a guardhouse. While emergency aid was being given to the victims, Whiteman began questioning the strikers and had the strike captain, William Miesznek call the workers over to him in pairs. The workers, for the most part, gave their names only and did not describe what had happened. Finally, Whiteman went to the group of strikers when individuals had ceased voluntarily appearing and said that they should come to be interviewed or face being taken to the station house. When he got to Robert Ballinger, Ballinger said "I did it" and "I'll go for it." At that time, he reported this to James Swope, who was the detective on the scene. Swope testified that when he interviewed Ballinger, Ballinger told him that he was trying to shoot out the lights at the guardhouse and apparently hit the three individuals.

Earlier in the day, strikers Ballinger, William Crossan and Robert Kendig had been together for an extended luncheon period at a tavern where they had been drinking beer. It was their intention to return to the 3M plant to distribute leaflets. The mood of the strikers was apparently heightened by the fact that a few days later there was to be a motorcade demonstration in Philadelphia to support the strikers' cause. Later, Kendig had stopped at his residence and when he returned to the scene he had with him a .22 caliber revolver. William Crossan was aware that Kendig had the firearm in his possession. After returning to the scene, leaflets were distributed, activities escalated, and beer drinking among many of the strikers continued. A number of union members threw bottles at the guardhouse during the time before the shooting, but soon this activity subsided. It is clear that Kendig displayed his revolver and at

some stage he was attempting to shoot parking lot lights out and, in particular, was seeking to strike a light and camera above the guardhouse. During the bottle throwing, a hurled bottle struck a flag and came down on the head of Ballinger who received a cut on the head, but sought no medical attention. At one time Crossan told Kendig to put the gun away "in no uncertain terms."

There was evidence that the weapon was handed from Kendig to Ballinger and while Ballinger was in possession of it the triple shooting occurred (Ballinger, called in the plaintiff's case, however, stated that he did not do the shooting.)

The theory upon which appellees ground their claim is that the unions negligently maintained the picket line; that they encouraged, condoned, acquiesced and participated through their agents in the violent behavior of the striking employees which led to the shooting. In furtherance of their theory, much of the extensive testimony elicited by plaintiffs at the liability phase of the bifurcated trial related to the relationship between the unions and various members. The trial court denied the unions' motions for a non-suit and a directed verdict and submitted the case to the jury.

THE APPLICABILITY OF THE PENNSYLVANIA LABOR ANTI-INJUNCTION ACT

[1] We first address the unions' defense that the sole applicable standard of proof to be applied in determining a labor organization's liability for violence occurring during the course of a labor dispute is that which is set forth in § 8 of the Pennsylvania Labor Anti-Injunction Act.

§ 206h. Liability of officers and members of labor organizations

No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute as herein defined, shall be held responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members or agents, except upon proof beyond a reasonable doubt in criminal cases, and by the weight of evidence in other cases, and without the aid of any presumptions of law or fact, both of--(a) the doing of such acts by persons who are officers, members or agents of any such association or organization; and (b) actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual

knowledge thereof by such association or organization. 1937, June 2, P.L. 1198, § 8.

Act of June 2, 1937, P.L. 1198 § 8, 43 P.S. § 206h.

Thus, the argument is that the above Act shields the unions from the plaintiffs' claim unless it can be shown that the offending acts were done by officers, members or agents of the union and that there was "actual participation in or actual authorization of" or "ratification of" the acts by the union. Our Supreme Court has recognized that the Pennsylvania Labor Anti-Injunction Act was patterned after § 6 of the Norris-LaGuardia Act, 47 Stat. 71, 29 U.S.C. § 106, and adopted the language of the United States Supreme Court in describing the purposes of § 206h.

> ". . . whether § 6 should be called a rule of evidence or one that changes the substantive law of agency . . . its purpose and effect was to relieve organizations . . . and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration."

Philadelphia M.T Ass'n v. International Long. Ass'n., 453 Pa. 43, 52, 308 A.2d 98, 103 (1973), quoting from *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 403, 67 S.Ct. 775, 780, 91 L.Ed. 973, 982-83 (1947). The United States Supreme Court later, in discussing § 6, stated:

> . . . the simple concern of Congress was that unions had been found liable for violence and other illegal acts occurring in labor disputes which they had never authorized or ratified and for which they should not be held responsible. Congress discerned a tendency in courts to blame unions for everything occurring during a strike.

Ramsey v. United Mine Workers, 401 U.S. 302, 91 S.Ct. 658, 28 L.Ed.2d 64 (1971). The legislative history is in accord. S.Rep. No. 163, 72 No. Cong. 1st Sess. 19 (1932).

> To hold that an officer or member of a labor organization, or the organization itself, should be liable for damages for unlawful acts committed while a strike is on, without clear, actual proof of authorization,

participation in, or ratification of such unlawful acts, would go far towards the destruction of organized labor.

The § 6 standard has been held to reach or extend to an action in tort to recover damages. *United Mine Workers v. Gibbs*, 383 U.S. 715, 86 S.Ct. 1130, 16 L.Ed.2d 218 (1966) and has been applied to tort action based on state law in *C & K Coal Co. v. United Mine Workers*, 704 F.2d 690 (3rd Cir.1983). See also *C & K Coal Co. v. United Mine Workers*, 537 F.Supp. 480 (W.D.Pa.1982) [same case]. *Curreri v. Teamsters Local 251*, 722 F.2d 6 (1st Cir. 1983); *Kerry Coal Company v. United Mine Workers*, 637 F.2d 957 (3rd Cir.1981); *Ritchie v. United Mine Workers*, 410 F.2d 827 (6th Cir.1969); *Federal Prescription Service, Inc. v. Amalgamated Meatcutters and Butcher Workmen*, 527 F.2d 269 (8th Cir.1975); *Kayser-Roth Corp. v. Textile Workers Union*, 479 F.2d 524 (6th Cir. 1973), *cert. denied*, 414 U.S. 976, 94 S.Ct. 292,38 L.Ed.2d 219 (1973). See also *Philadelphia Marine Trade Association v. International Longshoremen's Association*, 453 Pa. 43, 308 A.2d 98 (1973); *Wortex Mills v. Textile Workers Union of America*, 380 Pa. 3, 109 A.2d 815 (1954); *Fife v. Great Atlantic and Pacific Tea Company*, 356 Pa. 265, 52 A.2d 24 (1947). Compare *Schnabel Associates v. Bldg. and Construction Trades*, 338 Pa.Super. 376, 487 A.2d 1327 (1985) (Pennsylvania labor Anti-Injunction Act does not apply to civil contempt sanctions by reason of "violent exceptions." 43 Pa.C.S.A. § 206d(d)).

Although the cases which apply the labor act's more stringent standards of proof are indeed claims for damages for economic harm while the present action is for personal injury, we see no reason for distinction between the two. Given the intent to shield a union and its members from liability for acts not participated in nor authorized or ratified by them, we see no valid reason for distinguishing between economic and personal loss by reason of "individual" acts of union members. For this reason we disagree with the holding of the Washington Supreme Court in *Buchanan v. Int'l. Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers*, et al., 94 Wash.2d 508, 617 P.2d 1004.[2]

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[2] The *Buchanan* economic harm-physical harm distinction has been criticized. We agree with the following statement found in Note, *Labor Unions Vicarious Liability for Torts Committed by Members*, 57 Washington Law Review 193, 205-06 (1981).

> This conclusion also rebuts the argument in Justice Rosellini's concurrence that the Washington court was not bound by either *United Brotherhood* or *Gibbs* because those cases involved economic harms while *Buchanan* involved physical harm. This is solely a factual distinction, one that has been given no further support in any cases or statutes

(footnote continued on next page)

[2] Appellees next argue that if the § 206h standard applies generally to the present matter, it is in fact not applicable because of the provision of § 206d(d) which provides that the Act shall not apply in any case:

> (d) Where in the course of a labor dispute as herein defined, an employe, or employes acting in concert, or a labor organization, or the members, officers, agents, or representatives of a labor organization or anyone acting for such organization, seize, hold, damage, or destroy the plant, equipment, machinery, or other property of the employer with the intention of compelling the employer to accede to any demands, conditions, or terms of employment, or for collective bargaining. 1937, June 2, P.L. 1198, § 4; 1939, June 9, P.L. 302, § 1.

Here, it is argued that since there was damage to property in the course of the labor dispute, the present matter is exempted from the Act's strictures. We note that the only ascertained property damage was a broken window. We do not believe that the above provision, which was a 1939 amendment to the Pennsylvania Anti-Injunction Act, should be so broadly read, particularly to render inapplicable the liability restrictions grounded on strong public policy, in a case involving only incidental and insubstantial damage to property. A reading of the original 1937 Act and its 1939 amendment demonstrates that the Act was amended to restore to the courts the power to grant *injunctive relief* in certain labor dispute situations where there is seizure, damage, or destruction of property of the employer. The amendment properly reaffirmed the court's power to protect property rights from otherwise unrestrained appropriation or destruction. Pennsylvania cases are consonant with respect to this interpretation of the 1939 amendment. *Schnabel Associates v. Building and Construction Trades, supra*, was a case in which the lower court, after the issuance of injunctive relief, found the union in contempt. On appeal, this court noted that the Anti-Injunction Act did not apply because of the extensive property damage and violent activity, and relief was granted pursuant to the

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addressing a union's vicarious liability. Justice Rosellini assumed, without citing any authority, that the United States Supreme Court would decide a future tort case involving physical harm differently than it decided *Gibbs*, a tort case involving an economic harm. In fact, an indication to the contrary exists in *United Brotherhood* where the Court stated that "[t]he limitations of [section 6] are upon all courts of the United States *in all matters growing out of labor disputes*, covered by the Act, which may come before them." This willingness of the United States Supreme Court to broadly apply the union-liability standard is entirely consistent with the congressional decision to include among labor disputes "*any controversy* concerning terms or conditions of employment."

court's power to *restrain* violence, mass picketing and overt threats of violence in order to protect public order and safety and prevent damage. *See also Carnegie-Illinois Steel Corp. v. United Steel Workers of America*, 353 Pa. 420, 45 A.2d 857 (1946); *Westinghouse Electric Corp. v. United Electrical Radio & Machine Worken of America*, 353 Pa. 446, 46 A.2d 16 (1946); *DeWilde v. Scranton Building Trades and Construction Council*, 343 Pa. 224, 22 A.2d 897 (1941).

We conclude that the purpose of the 1939 amendment was simply to restore equity jurisdiction to the courts to restrain unlawful conduct in a labor dispute and does not apply to the present personal injury tort action.

[3] Further support for the conclusion that the § 206d(d) "damage" provision does not extend to the inconsequential window damage in this case is found in a recent panel case of this court. In *Frankel-Warwick, Ltd. v. Local* 274, 334 Pa.Super. 47, 482 A.2d 1073 (1984), where the court found that where picketing activities made travel on sidewalks and egress to the petitioner's hotel "difficult" it was not sufficient to amount to a seizure.[3] Similarly, the trivial damage incurred herein is not sufficient to invoke the violence exception. More recently, in *Solvent Machinery and Filters Systems, Inc. v. Teamsters Local Union 115*, 343 Pa.Super. 505, 495 A.2d 579 (1985) a panel majority of this court reversed the issuance of an injunction, where there was some property damage and picketing which resulted, at the least, in interference with the conduct of business. Our court observed that there was no evidence which linked the property damage to an intention of compelling the employer to perform specific acts as required by § 206d(d).

Finally, our court has recently spoken on the issue of the availability of a cause of action in negligence against labor unions in a matter arising out of a labor dispute. In *LaZar v. RUR Industries, Inc. v. United Steel Workers of America*, 337 Pa.Super. 445, 487 A.2d 29 (1985) (Spaeth, P.J., concurring in result) a picketing union member was injured in a melee while on picket duty. He sued the employer in tort for damages for negligence in failing to control off-duty employees. The employer sought to join the union as an additional defendant on the basis that its negligence caused the injury. Our court agreed with the trial court's dismissal of the complaint against the union. Citing provisions of the Labor Anti-Injunction Act, the court concluded that "[b]efore

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[3] To the extent that appellant argues that there was some slight interference with car access to 3M's plant, *Frankel-Warwick* is dispositive of any claim that this amounted to a "seizure."

a plaintiff may recover from a union in a strike-related complaint, he must be able to show, by the weight of the evidence, that the acts complained of were ordered, authorized or ratified by the union." 487 A.2d 29 at 31.

[4] The trial court, in the present case, concluded that the restrictive standards of § 206h did not apply and permitted the jury to find the appellees liable on common law agency principles under the duty to control the picket line theory. Nevertheless, at trial the court undertook to charge the jury in accordance with the standards set forth in § 206h and in answer to special interrogatories the jury found against the union defendants since the union "actually participated in, actually authorized or ratified after actual knowledge thereof, the unlawful acts which caused the injuries.[4] The trial court thus submitted the case to the jury on two theories: (1) § 206h; and, (2) common law agency principles as they relate to the duty to maintain a picket line. The theories were submitted in four separate interrogatories and the jury found against both unions on both theories. The second theory will be discussed *infra*. The charge of the court on the § 206h standard with the exception of the recitation of the jury interrogatories, was contained in a single paragraph and simply stated that there must be proof that the "acts charged were actually authorized, actually participated in by, or ratified after actual knowledge thereof by [the unions]." There were no instructions as to the meaning of these concepts as they might apply to the facts of this case. Nevertheless, we conclude that there is not sufficient evidence in the record of actual participation, actual authorization, or ratification to warrant submission of this issue to the jury and conclude that the trial court erred in doing so. In *Phila. M.T. Ass'n. v. ILA, supra*, our supreme court rejected the argument that a union could be held responsible for the acts of its members despite the fact that the lower court found the efforts to prevent the violation by various officers was "half hearted and not taken in good faith and inept" and in violation of the order to "take all reasonable steps which may be necessary [to carry out the order]." The supreme court concluded:

> However, we believe that much more is required to hold a union or its officers responsible under § 206h of the Pennsylvania Labor Anti-Injunction Act.

308 A.2d 98 at 103.

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[4] The "ratification" theory was charged to the jury despite the fact that the court had earlier excluded it as a permissible basis for recovery.

The court proceeded to cite the following from the United States Supreme Court opinion in *Brotherhood of Carpenters v. United States*, 330 U.S. 395, 403, 67 S.Ct. 775, 780, 91 L.Ed. 973, 982-93 (1947):

> "... whether § 6 should be called a rule of evidence or one that changes the substantive law of agency ... its purpose and effect was to relieve organizations ... and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization, without clear proof that the organization or member charged with responsibility for the offense actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration."

[5] It must be remembered that the unions are unincorporated associations, with large numbers of trustees, officers, employees and members, and that the purpose of § 206h is to protect the union and its membership from liability for unlawful and unauthorized acts of persons associated with the union. The tortious shooting in this case was an act of irrational behavior by a lone intoxicated member of the union, perpetrated without reason on the person of two fellow union members and a fellow employee. There is not a suggestion in the record that the unions and their membership authorized, participated in or ratified this act of wanton misconduct. Imposing liability on the union for the unauthorized lawlessness of its more improvident members would penalize the union lawfully engaged in using legitimate economic means to resolve labor-management conflicts. *Scott v. Moore*, 640 F.2d 708 (5th Cir. 1981). The fact that the record may contain evidence of acts of violence and unlawful conduct by persons who "were officers" and members of the union is insufficient without more to fix responsibility on the union. *Fife v. Great A & P Tea Co.*, 356 Pa. 265, 52 A.2d 24 (1947), *cert. denied*, 332 U.S. 778, 68 S.Ct. 42, 92 L.Ed.2d 362 (1947), *reh'g. denied*, 332 U.S. 821, 68 S.Ct. 143, 92 L.Ed. 397 (1947).[5]

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[5] In the following part of this opinion we find that the evidence does not support a finding of common law agency, a less stringent standard for fixing vicarious liability than that required by § 206h. That discussion, therefore, applies to our present disposition. In addition, a reading of the applicable cases makes it clear that the evidence here falls far short of the "clear proof" of actual authorization, participation or ratification necessary to render the union liable. *United Steelworkers v. Lorain*, 616 F.2d 919 (6th Cir.1980) *cert. denied* 451 U.S. 983, 101 S.Ct. 2313, 68 L.Ed.2d 839 (1981); *Kayser-Roth Corp. v. Textile Workers of America, supra*; *Curreri v. International Brotherhood of Teamsters, supra*; *Kerry Coal v. United Mine Workers, supra*; *C and K Coal Co. v. United Mine Workers, supra*; *James R. Snyder Co., Inc. v. Edward Rose and Sons, Inc.*, 546 F.2d 206 (6th Cir.1976); *Dow Chemical Co. v. International Union of Electrical Radio and Machine Workers*, 480 F.2d 433 (5th Cir.1973); *cert denied* 415 U.S. 932, 94 S.Ct. 1444, 39 L.Ed.2d 490 (1974).

We conclude that the restrictive standards of 206h apply to this matter, and that there was insufficient evidence of the actual participation, actual authorization, or ratification of the acts upon which appellees' claim is based to support a finding of union liability.

THE DUTY TO MAINTAIN AND CONTROL A PICKET LINE AND COMMON LAW AGENCY

[6] In addition to submitting the case to the jury on the basis of 206h liability, the trial court, by way of separate interrogatories, submitted the matter under a charge of duty to maintain a picket line and common law agency principles. The jury, in its verdict, also found the unions responsible under this theory. Since we have concluded that the restrictive standard of 206h applies and that the evidence of vicarious responsibility was insufficient as a matter of law, it follows that the court erred in submitting the case to the jury on the basis of common law agency principles since 206h permits recovery only under the restrictive conditions set forth in that provision. As a matter of judicial economy, however, we will discuss the matter under Pennsylvania's common law agency principles as we conclude that even if they were to apply, the evidence was insufficient as a matter of law and that judgment N.O.V. should be entered on this basis.

[7] In order to assess the legal propriety of the appellees' theory of union responsibility, it is again necessary to focus on the parties' respective contentions and the trial itself. Initially, it is important to observe that throughout the course of this litigation, including the trial, the charge to the jury and the appellate briefs, the terminology "principal and agent" is used almost exclusively. It is instructive, at the outset, to recognize that not every relationship of principal and agent creates vicarious responsibility in the principal for acts of the agent. The distinction was discussed by our supreme court in *Smalich v. Westfall*, 440 Pa. 409, 269 A.2d 476 (1970).

[11-13] Agency is the relationship which results from (1) the manifestation of consent of one person to another that (2) the other shall act on his behalf and subject to his control, and (3) consent by the other so to act: *Chalupiak v. Stahlman*, 368 Pa. 83, 81 A.2d 577 (1951); Restatement (Second), Agency § 1(1) (1958). Such agency results only if there is an agreement for the creation of a fiduciary relationship with control by the beneficiary: *Rosenberg v. Cohen*, 370 Pa.507, 88 A.2d 707 (1952); Restatement (Second), Agency § 1, comments a and b (1958). "The right

of control by the principal may be exercised by prescribing what the agent shall or shall not do before the agent acts, or at the time when he acts, or at both times * * *. Further, the principal has power to revoke the agent's authority, although this would constitute a breach of his contract with him * * *. The control of the principal does not, however, include control at every moment; its exercise may be very attenuated and, as where the principal is physically absent, may be ineffective:" Restatement (Second), Agency § 14, comment a. Since an agent who is not a servant is not subject to any right of control by his principal over the details of his physical conduct, the responsibility rests upon the agent alone, and the principal is *not* liable, for harm caused by his unauthorized negligent physical conduct: *Commonwealth v. Minds Coal Mining Corp.*, 360 Pa. 7, 60 A.2d 14 (1948); Restatement (Second), Agency § 250 (1958). Thus it has long been said to be the general rule that there is no vicarious liability upon the principal in such case: Prosser, The Law of Torts § 70 (3d ed. 1964).

[14-18] "A master is a species of principal, and a servant is a species of agent:" Restatement (Second), Agency § 2, comment a. "A master is a principal who employs an agent to perform service in his affairs and who controls or has the right to control the physical conduct of the other in the performance of the service. A servant is an agent employed by a master to perform service in his affairs whose physical conduct in the performance of the service is controlled or is subject to the right to control by the master:" Restatement (Second), Agency § 2(1) and (2) (Emphasis added.). Thus a master not only controls the results of the work but also may direct the manner in which such work shall be done, and a servant, in rendering the agreed services, remains entirely under the control and direction of the master: *Joseph v. United Workers Assn.*, 343 Pa. 636, 23 A.2d 470 (1942); *McColligan v. Penna. R.R. Co., supra.* "Those rendering service but retaining control over the manner of doing it are not servants. They may be agents, agreeing only to use care and skill to accomplish a result and subject to the fiduciary duties of loyalty and obedience to the wishes of the principal * * *:" *Commonwealth v. Minds Coal Mining Corp., supra*, 60 A.2d at 17. Because a master has the right to exercise control over the physical activities of the servant within the time of service, he is vicariously liable for the servant's negligent acts committed within the scope of his employment: Restatement (Second), Agency § 219 (1958); Prosser, The Law of Torts § 69 (3d ed. 1964).

440 Pa. at 413-15, 269 A.2d at 481.

See also Juarbe v. City of Philadelphia, 288 Pa.Super. 330, 431 A.2d 1073 (1981); *Turley v. Kotter*, 263 Pa.Super. 523, 398 A.2d 699 (1979).

[8,9] Similarly, although the charge of the court makes no mention of the concept of apparent authority, the briefs and opinion of the court *en banc* refer to the evidence as forming a basis for a finding of union responsibility on the basis of, *inter alia*, the apparent authority of Crossan and Kendig to act on behalf of Local 107. Appellees, for example, argue that Crossan was an agent of Local 107 and possessed actual, implied and apparent authority with regard to the picket line and rely upon the lower court's citation of *Reifsnyder v. Dougherty*, 301 Pa. 328, 152 A. 98 (1930) and *Revere Press, Inc. v. Blumberg*, 431 Pa. 370, 246 A.2d 407 (1968) for the principle that one who leads persons with whom his agent deals to believe that the agent has power to bind his principal may be liable on the theory of apparent authority. Thus, it is argued that Crossan had at least apparent authority over the conduct of the picket line and liability of the union ensues. While the doctrine of apparent authority is undoubtedly recognized in Pennsylvania, we fail to see its applicability to the present case. Apparent authority is grounded on the theory that the principal creates circumstances which cause one dealing with the agent to reasonably believe that the agent has the authority and relies on this belief. *Reifsnyder, supra*, and *Revere Press, supra*, cite the principle in settings dealing with contract liability because of reliance on the agent's authority. *See Juarbe v. City of Philadelphia*, 288 Pa.Super. at 343, 431 A.2d at 1079-80. ("The two doctrines [apparent authority and agency by estoppel] are customarily relevant in the context of business transactions . . . ."). Here, the claim is one in tort for the negligence which resulted in the shooting. We fail to see how the appellees can be said in any way to have *relied* upon the apparent authority of Crossan (or anyone else) to avoid being the victims of the shooting incident.

Finally, it is not clear from the record as to precisely what agent or servant of the union is claimed to have been negligent and in what manner. In the court's charge in chief, there is no mention by name of any "agent" of the union, although there is a reference to the fact that plaintiff contended that "certain union stewards and members of the negotiating committee were in fact agents of Local 107 . . . ." Nevertheless, the court went on to charge the jury to determine "the nature of the relationship which existed between certain witnesses and [the unions]." The general nature of the charge was further demonstrated when the court stated:

> Consider under all the evidence of this case whether any agency relationships existed. Consider which witnesses were officers or employees

of either Local 107 or the IBT. Consider what occurred during the course of the strike, and most importantly on January 25th, 1980.

That the jury may have been confused by the dual agency charge (i.e., 206h agency and common law agency) which were cast in only the most general terms is demonstrated by the fact that after twenty-five minutes of deliberation they returned with a question asking for a definition of agency. Again, less than two hours later the jury returned with another question relating to the agency charge. The jury, at this time, was refused their request for a dictionary. Thirty-five minutes later the jury asked for written instructions as to agency. At this time, the court again charged on agency making specific reference to Mr. Cimino, the president of Local 107, Mr. Smalley, the business agent, and Crossan and Kendig, but again left the issue of agency to the jury.

I will leave it to you to decide who, if any people would fall into that category, and Between local 107 and IBT, a principal, that is in this case local 107 with respect to his agent, if you find it has agents or the IBT with respect to its agents, if you find it has any agents. That's the question for you.

Thereafter, the jury resumed deliberation and returned the verdict.

We have discussed these matters, not in the context of error in the court's charge, for indeed it does not appear that there were any exceptions to the court's charge, but rather to determine the nature of the cause of action asserted by appellees and submitted to the jury by the court for, while there were no exceptions to the charge, appellants have consistently argued that the evidence was insufficient to permit a recovery against the unions.

[10] Thus, our present standard is to assess the asserted cause of action as formulated and fashioned by the court in its charge; to examine its cognizability under principles, of Pennsylvania law; and determine the sufficiency of evidence. We do so under the following standard:

The standard of review for an order denying a motion for a judgment N.O.V. is well defined. it is the same standard used by the trial judge in deciding whether to grant the motion. 'Accepting as true all facts and proper inferences which tend to support the contention of the party against whom the motion has been made, and rejecting all testimony and inferences to the contrary,' we must reverse such an order denying the

> motion 'when no two reasonable minds could differ that, as a matter of law, the party has failed to make out his case. *Timbrook v. Foremost Ins. Co.*, 324 Pa. Super. 384, 387, 471 A.2d 891, 892-93 (1984). It is not within this court's province to weigh the evidence or to render judgments as to credibility. *See City of Bethlehem v. Gawlik*, 30 Pa. Commonwealth Ct. 390, 374 A.2d 540, 542 (1977); P.L.E. Judgment § 146.

Ingrassia Construction Co. v. Walsh, 337 Pa.Super. 58, 486 A.2d 478, 480 (1984).

The duty which is alleged to have been breached is the duty to monitor and control a picket line. We are furnished no cases directly dealing with this concept of union responsibility. Furthermore, the court provided no instruction as to the nature of a union's accountability with respect to setting up and managing a picket line, the degree of control, monitoring or surveillance which reasonably must be maintained over the picket line, and the standards applicable thereto; or the conditions under which the union may reasonably be required to take action to avoid the accidents or injury as a result of misconduct on the picket line. The jury was simply told to determine *if* the unions had a duty to monitor and control the picket line and thereafter to decide whether they were negligent in carrying out that duty.

[11] Assuming, arguendo, that a duty to maintain a picket line is a cognizable duty of a union under Pennsylvania law, we believe it is error for the court to leave to the jury to decide if such a duty exists (and also, presumably, the nature and extent of the duty). The existence of a duty and its extent is not for the jury to determine. *Cf. O'Toole v. Borough of Braddock*, 397 Pa. 562, 155 A.2d 848 (1959) (court erroneously charged jury to determine issue of law); *Berry v. Friday*, 324 Pa.Super. 499, 472 A.2d 191 (1984) (a trial judge is charged with the responsibility of determining all pertinent questions of law). Stated otherwise, we conclude that it was error for the court to submit to the jury a cause of action for failure to monitor and control a picket line wherein the existence of the duty to maintain a picket line is left for jury determination.

[12] We further find that, under the facts of this case, there was no breach of duty by the unions which could form the basis for recovery of damages from the unions. Initially, when we view the conduct of union member Ballinger, we think it is clear beyond peradventure that his act in shooting his fellow employees, including two fellow strikers, was beyond any reasonable scope of his authority.

The law is clear that a servant who uses excessive force or acts in an outrageous manner steps outside the scope of his authority and in such circumstances, the master is not vicariously liable for the servant's act. *Lunn v. Yellow Cab Co.*, 403 Pa. 231, 169 A.2d 103 (1961) (cab driver stabbed prospective passenger in altercation); *Potter Title and Trust Co. v. Knox*, 381 Pa. 202, 113 A.2d 549 (1955) (cab driver shot at striking workers); *Howard v. Zaney Bar* 369 Pa. 155, 85 A.2d 401 (1952) (owner of bar not liable when bartender shot patron who had made a pass at female customer); *Fitzgerald v. McCutcheon*, 270 Pa.Super. 102, 410 A.2d 1270 (1979) (off duty policeman shot neighbor while attempting "arrest"); *Straiton v. Rosinsky*, 183 Pa.Super. 545, 133 A.2d 257 (1957) (movie usher struck patron with flashlight--under facts, scope of employment for jury, but issue may be one of law).

[13,14] Appellant's theory of union responsibility seeks to avoid the consequences of this principle which would be a barrier to union responsibility by focusing on the duty to maintain the picket line. In this regard, although it was not apparent from the charge, a reading of the briefs[6] and the record, discloses that the thrust of appellees' argument centered on the role which William Crossan played during the strike action and, specifically, at the time of the incident forming the basis of this suit. The appellees contend that Crossan represented the local in a supervisory capacity with respect to the picketing. The union, while admitting that Crossan had acted as chief steward for the union at the 3M plant, argued that his duties in this capacity expired with the union contract, and that he had no official supervisory role with respect to the conduct of the picket line. We have already disagreed with the court's discussion of apparent authority as having no applicability to the present claim of tort liability. Nevertheless, insofar as the role of Crossan acting on behalf of the union in a managerial capacity with respect to the picketing activities, the record supports a conclusion that he was vested with at least some authority to act in a supervisory capacity with respect to the operation of the picket line.[7] Merely concluding that Crossan had some authority over the picket line, however, does not fix responsibility on the

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[6] The opening and closing addresses to the jury and counsel's arguments on legal points are not part of the record.

[7] Evidence of Crossan's supervisory role as shown by actual or implied authority, included the fact that he helped write up the picketing assignments when the strike was initiated; he came to the picket line to make sure who was there for pay purposes; he received reports from the picketers and passed them on to the business agent; and distributed strike funds and leaflets which bore his name as a member of the negotiating committee.

union for, inevitably, contrary to appellees' argument, one must determine the scope of the authority, and whether the shooting was so contrary to the likely incidents of picketing activities as to be unforeseeable and beyond the scope of reasonable control of picketing. Accordingly, one must determine not only the fact of agency, but also the dimensions thereof. *Cf. Mellon Nat'l. Bank v. Esler*, 357 Pa. 525, 55 A.2d 327 (1947); *Lewis v. Matias*, 300 Pa. 238, 150 A. 636 (1930); *Beal & Simons v. Adam Express Co.*, 13 Pa.Super. 143 (1900).

Essentially, the duty which appellees seek to vest in Crossan, (absolute responsibility to police the picket line) is not one supported by the evidence. The present case is unlike cases where the owner of a bar may be responsible for the maintenance and policing of employees and patrons on the premises. *See Ash v. 627 Bar, Inc.*, 197 Pa.Super. 39, 176 A.2d 137 (1961); *Poulos v. Brady*, 167 Pa.Super. 150, 74 A.2d 694 (1950) or, where the agent is employed in a capacity where the tortious act is directly related to the performance of the agent's duties. *See Orr v. William J. Burns International Detective Agency*, 337 Pa. 587, 12 A.2d 25 (1940) (shooting by guard hired to protect persons and property); *Sebastianelli v. Cleland Simpson*, 152 Pa.Super. 203, 31 A.2d 570 (1943) (attack on suspected shoplifters by detective in the employment of store). But even in these situations, not every act is attributable to the principal. *Mac Phail v. Pinkerton's National Detective Agency*, 134 Pa.Super. 351, 3 A.2d 968 (auto repossessor held to be outside scope of employment in personal assault); *Dalsey v. Czeiner*, 154 Pa.Super. 194, 35 A.2d 523 (1944) (bartender-in-charge struck patron off premises after closing). *See also Teal v. Kings Farms Co.*, 285 F.2d 62 (3d Cir. 1960) (employer not liable for assault on fellow employee unless master knew or should have known of the necessity and opportunity for exercising control); Restatement of Torts 2nd § 317.

Assuming, then, that Crossan had some duty to maintain or control the picket line, this fact does not make him or the union the insurer of the conduct of the picketers, nor does it make the acts of Crossan the act of the union for he is at best acting only as an agent or servant of the union. Simply removing the responsibility one step from the acting tortfeasor (Ballinger) does not avoid the issue: was not the shooting, either viewed from the standpoint of Ballinger as actor or Crossan as agent with some supervisory responsibility, so far outside the scope of the agent's authority as to render the master (union) not responsible. Our supreme court here opined:

> An act may be within the scope of the employment although consciously criminal or tortious. On the other hand, the fact that the servant intends to commit a crime, especially if the crime is of some magnitude, is to be

> considered in determining whether or not the act is within the employment, since the master is not responsible for acts which are clearly inappropriate to or unforeseeable to the accomplishment of the authorized result. As in other cases, *it is a matter of degree, the question being whether or not the conduct is so unlike that authorized that it is substantially a different thing*. Sum.Pa.Jur. Agency, Section 238.

First National Bank of Altoona v. Turchetta, 407 Pa. 511, 181 A.2d 285, 287-88 (1962) (emphasis in original).

Appellees' theory is that Local 107 was negligent in that this shooting was a natural and foreseeable consequence of its negligent maintenance of the picket line and that the union created an atmosphere ripe for violence and injury. As support for the theory that the union anticipated violence on the picket line, appellees cite the fact that the union business agent gave a speech to the membership at the time the strike vote was taken in which he stated there was to be no violence or "carrying on" on the picket line. This laudable caution is cited by appellees as evidence that violence was anticipated. The argument is disingenuous. Picketing is, of course, perfectly legal. It is, by its nature, confrontational and carries risks that untoward incidents may occur. To suggest that exhortations against violence may be used as the basis of respondeat superior responsibility for a subsequent shooting defies experience and logic. Other instances of misconduct cited by appellees are equally unpersuasive as evidence that the shooting or Crossan's alleged laxity were foreseeable. For example, appellees cite Smalley's awareness of isolated instances such as nails placed in the 3M parking lot, a single occasion when a rock was thrown through a 3M window, and some evidence that, despite admonitions to the contrary, there was some drinking during the picketing activities. It is more than a quantum leap to conclude that from such isolated instances during a ten week strike, the unions could be held to foresee that a member would become intoxicated, have possession of a deadly weapon and fire upon and strike three persons without reason; or, given appellees' theory as to the duty to control the picket line, that an employee with some supervisory capacity would not intervene to prevent the shooting incident.

Similarly, appellees extract several remarks from the labor-management rhetoric which accompanied the strike action to support their claim of union responsibility. Thus, on one occasion, the local president, Cimino, stated to the 3M negotiator following a lack of progress "... it is going to get hot now" and on another occasion Smalley stated "it's calm now but wait." Given the hyperbole and posturing that inevitably accompany labor-management nego-

tiations one would have to engage in tortured reasoning to conclude that these isolated remarks evidence awareness of a risk that there would be such a bizarre dereliction by a drunken member, which, even giving credence to the most distorted reasoning, could in any circumstances be interpreted to further the union's cause in any way.

We assume, without deciding, that Pennsylvania would recognize a duty in a union to control a picket line authorized by it. We conclude, however, that there was insufficient evidence to warrant jury determination that the shooting incident, or the failure to monitor or control the picket line, were, on application of agency principles, attributable to the union. We reach this conclusion as to both Local 107 and IBT, and we do so regardless of whether Ballinger, Crossan, Kendig, Smalley, Cimino or any other individual be viewed as the agent of the unincorporated associations (unions) for the purposes of vicarious liability.

Since we have concluded that judgment N.O.V. should be entered in favor of both appellant unions, we do not reach the other issues raised by appellants on appeal.

Judgment N.O.V. entered in favor of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Highway Truck Drivers and Helpers Local Union No. 107.

Gajkowski et al.

v.

International Brotherhood of Teamsters et al.

C.P. Bucks County, Civil Action Law, Nos. 80-6719-09-2, 80-6720-11-2 and 80-6721 - 12-2. Negligence: Ronald J. & Frances Gajkowski v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, et al. (80-6719-09-2); Ronald Schipske v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, et al. (80-6720-11-2); William & Jean Abate v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, et al. (80-6721-12-2).

Gregory T. Magarity, Mark L. Alderman and *Debra Klebanoff*, of Wolf, Block, Schorr and Solis-Cohen, for plaintiffs.

Thomas W. Jennings, Neil Sagot and *William J. Einhorn*, of Sagot & Jennings, for defendants.

BIEHN, J., September 5, 1984.

[Before: Garb, P.J.; Biehn, J. and Biester, Jr., J.]

On January 25, 1980, Ronald Gajkowski and Robert Schipske, members of Teamsters Local Union No. 107 (Local 107) and William Abate, a security guard for the Minnesota Mining and manufacturing Company (3M), were shot and injured at the site of a picket line. Following an intense seven-day trial producing 1113 pages of testimony and 77 exhibits, and involving several unique questions of law in this Commonwealth a jury found both Local 107 and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (IBT) liable and returned a verdict in the amount of $1,305,160.00 in favor of all Plaintiffs.[1] Gajkowski and Schipske were found to be 20% comparatively negligent.

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[1] The verdict was as follows: Ronald Gajkowski, $589,960; Frances Gajkowski, $62,500; Robert Schipske, $12,000; William Abate, $540,700; and Jean Abate, $100,000.

Defendants filed timely post-trial motions seeking an arrest of judgment, judgment non obstante veredicto or, in the alternative, a new trial. For reasons stated below, all post-trial motions are denied.

FACTUAL OUTLINE

The following facts were established at trial. In November, 1979, the contract between Local 107 and 3M expired without a new agreement being reached. A lawful economic strike was called and a picket line was established at 3M's Bristol plant. The strike lasted until February, 1980. The events that gave rise to the present action centered around January 25, 1980, when Gajkowski, Schipske and Abate were shot at the picketing site. Suit was thereafter instituted against Local 107 and the IBT.

Local 107 and IBT are both unincorporated associations. Local 107's affairs are controlled and administered by its By-Laws (Plaintiffs' Exhibit 26) in conjunction with the Constitution of the International Union (Plaintiffs' Exhibit 27). At the time of the strike at 3M, Joseph Cimino was President of Local 107. Other principal participants in the incidents of this case include John Cotter, an administrative assistant to the general president of IBT; John Smalley, business agent of Local 107 who was in charge of the strike at 3M; William Crossan, an employee of 3M and chief steward at the time of the strike; Robert Kendig, also an employee of 3M and a shop steward; and Robert Ballinger, a member of Local 107, who fired the shots. Additionally, Smalley was chief negotiator for the 3M employees and Crossan and Kendig were members of the negotiating committee.

On January 25, 1980, Plaintiffs Gajkowski and Schipske arrived at the 3M Plant at approximately 8:00 p.m. to fulfill their weekly picketing duty. Plaintiff Abate was on duty as a security guard employed by 3M.

Crossan, who was not assigned to a particular picketing shift and who was at the picketing site almost every day, had arrived early on the morning of January 25. Crossan had a conversation with Smalley during which Smalley asked him to distribute leaflets that afternoon to non-striking employees of 3M as they left work.

Prior to doing this, Crossan went to lunch with Kendig and three other men. Evidence established that all of the men were drinking continuously throughout the lunch. There was also drinking at the picketing site although

Smalley had told the strikers on more than one occasion that there was to be no drinking on the picket line.

When the men returned to 3M, Crossan and Kendig began handing out the leaflets. They had some verbal confrontations with some of the employees who did not want the literature. Kendig also began letting the air out of tires on the cars of 3M employees.

Later in the evening, Crossan and Kendig left the Plant to go to Kendig's house for a short while. On the way back to 3M Kendig showed Crossan that he had a gun. Back at the picket site, Kendig handed Crossan the gun and told him to shoot out some lights. Crossan refused to fire any shots, but did nothing further by way of admonishing Kendig to remove the gun, removing it himself, or bringing the incident to anyone's attention.

Testimony established that there were more people on the picket line by the evening of January 25 than there usually were. Shots were reportedly heard by some of those present at two separate times. Prior to the shooting incident, some of the picketers participated in throwing rocks and bottles at the security guardhouse, resulting in the police being called. Robert Ballinger, one of the strikers, was hit in the head by an object, but did not seek medical treatment.

Ballinger was one of the men who had had lunch earlier in the day with Crossan and Kendig and had been drinking. He admitted at trial that he saw Kendig later that evening at the picket site, and Kendig handed him the gun.

At approximately 8:35 p.m., the shooting of the three Plaintiffs occurred. When questioned by police a short while after the incident, Ballinger admitted that he fired the shots and later entered a plea of nolo contendre to the criminal charges.

Gajkowski was shot in the left side of the head and lost his left eye. Abate was shot in the neck and suffered severe internal injuries. Schipske was shot across the bridge of the nose.

STANDARD OF PROOF

The applicable standard of proof was the subject of substantial pretrial discussions between counsel and the Court. Defendants contended that the strict proof provisions of §8 of the Pennsylvania Labor Anti-Injunction Act applied. Plaintiffs argued this was a negligence case.

CHARGE TO THE JURY

There is no Pennsylvania authority on this issue. As will be discussed in great detail below, after considerable reflection we decided that the applicable standard of proof is simple negligence by the preponderance of the evidence. But, recognizing this to be a close legal question, we presented to the jury alternative theories of liability through special interrogatories. Defendants argue that submission of both standards to the jury resulted in such confusion that a new trial must be granted. Defendants contend that the confusion of the jury is evidenced by the fact that it returned several times with questions for the Court.

Where, as here, there is no controlling black letter law, the Court chose this method as the fairest to both parties. The Court also chose this procedure in the interest of judicial economy, to hopefully eliminate the necessity of a new trial. It took more than four years for this case to come to trial. As a result of this incident, one of the Plaintiffs (William Abate) is in very poor health. The trial was long and complex.

In its verdict, the jury found both Defendants liable on both theories. This verdict avoids the necessity of a new trial based on an inappropriate charge and will allow the appellate court to examine the record to determine if, under whichever legal standard it finds applicable, there is sufficient evidence to justify the verdict rendered. The sufficiency of the evidence in this record under both theories will be analyzed hereafter.

In this case, in submitting alternative theories of liability to the jury in separate special interrogatories, the Court took appropriate steps to avoid any jury confusion in distinguishing between the standards. In *Thompson v. Anthony Crane Rental, Inc.*, ___ Pa. Superior Ct. ___, 473 A.2d 120 (1984), the appellant maintained that it was error for the lower court to charge the jury on both strict liability and negligence as grounds for recovery by the plaintiffs when the theories were mutually exclusive. The court held the following:

> Appellant argues that a new trial was mandated as a result of such instructions. We must disagree. While we have explained that the strict liability issue, based upon the "malfunction" theory, should not have been presented to the jurors under the particular facts of this case, *it is clear that appropriate steps were followed by the lower court to avoid any confusion on the part of the jurors in distinguishing between the strict liability and*

> *negligence issues. The court's instructions clearly and separately explained the two theories. The avoidance of confusion was further enhanced by the court's submission of special interrogatories, which caused the jurors to separate their consideration of the two issues.* Thus, one interrogatory questioned whether the crane was leased in a defective condition, while a separate interrogatory sought a finding as to whether Mr. Torek had operated the crane in a negligent manner. In light of these circumstances, we cannot conclude that the court's instructions on both theories of recovery created grounds for a new trial. (Emphasis added.)

Thompson v. Anthony Crane Rental, Inc., supra, at 126.

Similarly, in the present case, appropriate steps were taken by the Court to avoid jury confusion. The Court instructed the jury separately on the two theories of liability and the jury was required to answer specific interrogatories as to each. The Court charged as follows:

> You will not be asked in this case to bring in a verdict for or against any person or organization. Rather, it will be your duty to answer a number of questions in regard to each individual plaintiff and each individual defendant. Your answers to those questions must be based upon the application of the facts as you find them to be, as they fit within certain legal principles which I will be defining to you.
>
> The first two questions you will be asked to decide are as follows:
>
> One, with respect to the injuries suffered by each individual plaintiff, do you find that Local 107 was negligent and that its negligence, if any, was a substantial factor in bringing about the injuries?
>
> Two, with respect to the injuries suffered by the plaintiffs, do you find that the IBT was negligent and that its negligence, if any was a substantial factor in bringing about those injuries?

(Notes of Testimony, March 1, 1984, pages 274-275.)

The jury was then instructed on the burden of proof, the legal meaning of negligence, the concept of agency and comparative negligence. The Charge then continued as follows:

But basically you will decide in questions 1 and 2 whether the plaintiffs have established whether Local 107 was negligent, whether the plaintiff has established whether the IBT was negligent, and if they were, whether the plaintiffs themselves were negligent and whether that was established by the defendants, and if they did, what the proportions are of liability. That is the first part of your deliberation.

Now, I will tell you with regard to all of the plaintiffs, if your answer to question number 1 regarding the negligence of Local 107 is, yes, in other words if you find that Local 107 was negligent, then you should go on to consider the question number 3 and this will all be evident to you on the sheet. Similarly, if your answer to question number 2 involving the negligence of IBT is, yes, you should go on to consider question number 4.

For the purposes of questions number 1 and 2, the plaintiffs need to establish their contentions by the preponderance of the evidence, to prevail under questions 3 and 4, the plaintiffs must establish by clear proof that the acts charged were actually authorized, actually participated in by, or ratified after actual knowledge thereof by Local 107 and/or the IBT. In other words, to meet their burden of proving this standard by clear and convincing evidence, the plaintiffs must present evidence to you which contains a high degree of clarity. It must be so certain and/or so trustworthy that it convinces you that the answer to the question has been established.

Questions numbers 3 and 4 will be as follows:

> Three, with respect to the injuries suffered by plaintiff, do you find that Local 107 actually participated in, actually authorized or ratified after actual knowledge thereof the unlawful acts which caused the injuries?
>
> In question 4 of course, is the same question as it refers to the IBT with respect to the injuries suffered by the plaintiff, do you find that IBT actually participated in, actually authorized, or ratified after actual knowledge thereof the unlawful acts which caused the injuries?

(Notes of Testimony, March 1, 1984, pages 283-285.) (See also Court Exhibits 1, 2 and 3 for interrogatories submitted to jury.)

It is apparent from the above, that the Court never commingled the two liability standards. The jury's verdict is clear as evidenced by the verdict sheet. The jury did, in fact, return with questions as it was instructed was its right to do. Three of the questions concerned the concept of agency; the other was a request for a dictionary.

The jury was faced here with a long and complicated case. It was a seven-day bifurcated trial that resulted in more than 1,000 pages of testimony and instructions, 700 pages of which composed the liability portion. Given this, the jury's questions do not indicate, as Defendants argue, that its confusion was "rampant."

DISCUSSION AS TO APPLICABLE STANDARD

As stated above, Defendants contend that the applicable standard of proof to be applied in determining a labor organization's liability for violence occurring during the course of a labor dispute is that contained in Section 8 of the Pennsylvania Labor Anti-Injunction Act.

Section 8 of the Act reads as follows:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute as herein defined, shall be held responsible or liable in any civil action at law or suit in equity or in any criminal prosecution for the unlawful acts of individual officers, members or agents, except upon proof beyond a reasonable doubt in criminal cases, and by the weight of evidence in other cases, and without the aid of any presumptions of law or fact, both of (a) the doing of such acts by persons who are officers, members or agents of any such association or organization; and (b) actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof by such association or organization. 1937, June 2, P.L. 1198, §8.

43P.S.§206h.

We find, however, that the above statute is not controlling here. We believe that Section 8 was not intended to be used to deny a person the right to recover for personal injuries under the common law negligence standard.

Section 8 of the Pennsylvania Act was patterned directly after Section 6 of the Norris-LaGuardia Act which provides that:

> No officer or member of any association or organization, and no association or organization participating or interested in a labor dispute, shall be held responsible or liable in any court of the United States for the unlawful acts of individual officers, members, or agents, except upon clear proof of actual participation in, or actual authorization of, such acts, or of ratification of such acts after actual knowledge thereof.
>
> Mar. 23, 1932, c. 90, §6, 47 Stat. 71.

29 U.S.G.A. §106.

Defendants have relied upon a line of cases demonstrating the federal judiciary's application of Section 6 of the Norris-LaGuardia Act to tort actions.

Defendants cite *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 736-737, 86 S. Ct. 1130, 16 L.Ed.2d 218 (1966) in which the Supreme Court stated, "The driving force behind §6 . . . was the fear that unions might be destroyed if they could be held liable for damage done by acts beyond their practical control." In *Gibbs*, the tort complained of was interference with contracts.

In *United Brotherhood of Carpenters and Joiners of America v. United States*, 330 U.S. 395, 403, 67 S. Ct. 775, 91 L.Ed. 973 (1947), also cited by Defendants, the Supreme Court held:

> We need not determine whether §6 should be called a rule of evidence or one that changes the substantive law of agency. We hold that its purpose and effect was to relieve organizations, whether of labor or capital, and members of those organizations from liability for damages or imputation of guilt for lawless acts done in labor disputes by some individual officers or members of the organization without clear proof that the organization or member, charged with responsibility for the offense, actually participated, gave prior authorization, or ratified such acts after actual knowledge of their perpetration. (Footnotes omitted.)

In *United Brotherhood of Carpenters*, the defendants were charged with conspiracy to violate the Sherman Anti-Trust Act.

The Pennsylvania Supreme Court adopted the above language of *United Brotherhood of Carpenters* in analyzing Section 8 of the Pennsylvania act and

stated that it believed Section 8 was intended to have the same purpose as Section 6 of the Norris-LaGuardia Act. The Court had before it an appeal from a decree holding several local unions in contempt of a preliminary injunction. *Philadelphia Marine Trade Association v. International Longshoremen's Association, et al.*, 453 Pa. 43, 50-52, 308 A.2d 98 (1973).

We are mindful, as Defendants stress, that the legislative intent underlying Section 6 was to protect against the destruction of organized labor as, "Congress discerned a tendency in courts to blame unions for everything occurring during a strike." *Ramsey v. United Mine Workers of America*, 401 U.S. 302, 310, 91 S. Ct. 658, 28 L.Ed.2d 64 (1971). Nevertheless, it is legislative history that prevents the application of Section 8 in the manner advanced by Defendants. A review of the purpose of the Act as a whole reveals that it was never intended to deny Plaintiffs redress for personal injuries.

> The Norris-LaGuardia Act, on the other hand, was designed primarily to protect working men in the exercise of organized, economic power, which is vital to collective bargaining. The Act aimed to correct existing abuses of the injunctive remedy in labor disputes. Federal courts had been drawn into the field under the guise either of enforcing federal statutes, principally the Sherman Act, or through diversity of citizenship jurisdiction. In the latter cases, the courts employed principles of federal law frequently at variance with the concepts of labor law in the States where they sat. Congress acted to prevent the injunctions of the federal courts from upsetting the natural interplay of the competing economic forces of labor and capital.

Brotherhood of Railroad Trainmen v. Chicago River and Indiana Railroad Company, 353 U.S. 30,40, 77 S.Ct. 635, 1 L.Ed.2d 622 (1957).

> The Norris-LaGuardia Act was passed for the purpose of limiting the circumstances and conditions under which injunctive action could be taken against labor organizations in the context of a labor dispute. The labor injunction had been an important device used by employers to counter organized labor's most effective economic weapons, strikes, boycotts, and picket lines. However, the Act was predicated on the conviction that labor disputes turned on issues of social and economic policy that could not appropriately be resolved by the courts. The legislative solution to the problems confronting workers in a complex industrial economy was union organization and collective bargaining. Since the ready issuance of labor injunctions presented a serious obstacle to the

> concerted activities of organized workers, Congress decided to remove the federal judiciary from labor disputes.

Scott v. Moore, 640 F.2d 708, 713 (1981).

> The Norris-LaGuardia Act was passed in a particular social, economic, and legal milieu. During the early part of this century, federal injunctive powers were often invoked to check the spread of union organization and collective bargaining. But Congress conceived that the courts were being made to play a partisan role in labor-management conflicts, in part because judicial injunctive relief usually did nothing to resolve the underlying industrial dispute. The Norris-LaGuardia Act was intended to curb this unwarranted judicial interference in the struggle between employers and employees. Instead, Congress decided to allow such controversies to be settled through negotiation and through the free play of economic forces.

Scott v. Moore, *supra*, at 727.

It is clear from the above that the purpose of labor anti-injunction statutes was to prevent powerful business enterprises from using the court system to destroy organized labor's attempts to protect the working man. We refuse to construe the Pennsylvania act, as Defendants request, so as to deny Plaintiffs their common law rights of recovery for bodily injuries.

AGENCY

Since Section 8 is not applicable, we must, therefore, look to the ordinary principles of negligence and agency to determine the authority upon which Defendants' liability may be grounded.

> The liability of a principal to third parties for the acts of an agent may rest on the following grounds: (1) express authority, or that which is directly granted; (2) implied authority, to do all that is proper, usual and necessary to the exercise of the authority actually granted; (3) apparent authority, as where the principal holds one out as agent by words or conduct . . . .

Reifsnyder et al. v. Dougherty, 301 Pa. 328,333,152 A.2d 98 (1930).

Apparent authority is power to bind a principal which the principal has not actually granted but which the principal leads persons with whom his agent

deals to believe he has granted. Persons with whom the agent deals can reasonably believe that the agent has power to bind his principal if the principal knowingly permits the agent to exercise such power or if the principal holds the agent out as possessing such power. *Revere Press, Inc. v. Blumberg, et al.*, 431 Pa. 370,375, 246 A.2d 407 (1968).

In the present case, the evidence is sufficient to support a finding that Crossan and Kendig were agents of Local 107 and possessed actual, implied and apparent authority with regard to the picket line. Additionally, as will be discussed later, there is sufficient evidence to establish that Local 107 was at all times acting as the agent of IBT.

Defendants assert that the initial crucial inquiry is whether Crossan and Kendig possessed any authority by virtue of their positions during the effective term of the contract to represent the interests of Local 107 and IBT on the picket line after that contract expired. (Memorandum at 78.)

Evidence established that the duties of a chief steward, the position Crossan held were to process grievances and otherwise to represent the employees' interests while the contract was in effect. As members of the negotiating committee, both Crossan and Kendig were to keep the strikers apprised of the status of the negotiations.

Crossan testified that when the contract expired, he no longer had any duties to fulfill as chief steward and that he had no responsibility for the conduct of the picket line even though he was a member of the negotiating committee. (Notes of Testimony, February 29, 1984, pages 5-6.)

The record shows, however, that the position of steward is an elected position that runs "for a term not to exceed one (1) year." [Plaintiffs' Exhibit 26, Section 12(A).] There is an absence of evidence that Crossan's chief stewardship automatically ended or that his authority was ever expressly withdrawn. The testimony of numerous witnesses supports a finding that no one was aware of any change in Crossan's authority.

From the beginning of the strike, Crossan was in the forefront of the union activity. At the meeting in November, 1979, after the strike vote was taken, Crossan helped to write up the assignments for the picketing shifts. He did not take a particular shift but testified that, "I just came out so often that there was no need for me to have a steady shift." (Notes of Testimony, February 28, 1984, pages 415-417.)

Crossan also testified as follows:

Q. And when you were out there, what did you see your role as?

A. Checking the pickets, I guess to make sure that they were there, the ones that were supposed to be there, and in order that they be paid.

Q. How about giving them any encouragement and support?

A. Yes.

Q. Now, when you were on the picket line and Mr. Smalley [the business agent] was not there would people come to you and ask you questions or report things to you?

By people I mean other picketers?

A. Yes, they would report them to me, and I would in return report them to Jack [Smalley].

(Notes of Testimony, February 28, 1984, pages 417-418.)

Crossan also was involved in the distribution of strike funds and in distributing leaflets. (Notes of Testimony, February 28, 1984, pages 418, 421.) Some of the leaflets had his name on them, as a member of the negotiating committee. (Notes of Testimony, February 28, 1984, page 421.)

Various employees of 3M testified to Crossan's apparent authority. Richard Lloyd, a 3M employee of fifteen years testified as follows:

Q. And with regard to organizing the strike, who in your recollection was in charge of organizing the members of 107 at the plant that went out on strike?

A. At the plant I would say Bill Crossan.

Q. All right now, did Mr. Crossan have a position?

A. He was chief steward at that time.

Q. Okay, and what could you please explain to us what he did in organizing the strike?

A. Well, he was on the negotiating committee and whatever went on I guess behind closed doors between our union and the company. We got reports back from him to shop stewards and to us.

(Notes of Testimony, February 27, 1984, page 107.)

Henry Mason, another 3M employee, testified that, "If Mr. Crossan was at the picket line, he would have been in charge, and unless there was a business agent there or somebody of higher rank in the union. So if he would have asked me to do something, I probably would have done it within reason." (Notes of Testimony, February 28, 1984, pages 173-174.)

Defendants argue that the evidence in this case demonstrates that Plaintiffs' witnesses who identified Crossan as possessing authority on the picket line were unable to provide any concrete example of the manifestation of that authority, other than that Crossan was at the picket line by his own choice more frequently than most. Defendants contend that the witnesses' declarations of Crossan's authority were nothing more than assumptions based solely on the authority Crossan indisputably possessed while the contract was in effect.

On cross-examination, Richard Lloyd testified as follows:

Q. My question, sir, is, is it a fact that no one told you Mr. Crossan had any responsibility with regard to that picket line; isn't that a fact?

A. Yes, it is.

Q. Also a fact that no one told you that Mr. Kendig had any responsibility for that picket line; isn't that right?

A. Yes.

(Notes of Testimony, February 27, 1984, page 142.)

Henry Mason testified:

A. I thought that the chief steward was in charge of the picket line. I thought that. All right, so I was wrong. Maybe they weren't, but I

thought at the time that they were in charge. I thought them two were in command.

(Notes of Testimony, February 28, 1984, pages 218-219.)

We agree with Defendants that the witnesses were unable to testify that anyone from the Union had ever expressly indicated to them that Crossan or Kendig possessed any authority. Nevertheless, their testimony, taken together with all the other evidence, is more than sufficient to demonstrate actual and apparent authority. With respect to the issue of apparent authority, it is obvious that the employees who looked to Crossan and Kendig, their chief steward and steward before the strike, continued to do so while the strike was in progress and that Crossan and Kendig continued to be, with Defendants' knowledge and treatment of them, persons in charge.

With respect to actual authority, the evidence supports a finding that Defendants held Crossan out as a person with authority at the picket site. George Cook, another 3M employee, testified that he was the shift captain for the 4:00 p.m. to 8:00 p.m. shift on Fridays. He testified that shift captains were chosen randomly. The first person to sign up for a shift became the shift captain whose only real function was to check off the names of the strikers as they reported for their shift duty. (Notes of Testimony, February 28, 1984, pages 272-273.) He further testified as follows:

Q. Did you receive any instructions from Mr. Smalley or anybody from the Philadelphia office of Teamsters 107 as to what, if anything, you should report to him?

A. No.

Q. Okay, did you have any conversations with Mr. Smalley as a shift captain?

A. No.

(Notes of Testimony, February 28, 1984, page 273.)

Q. Okay, now, did Mr. Smalley give you any instructions as to the chain of command of how to reach him?

A. No.

Q. If you wanted to contact anyone from the union, would you have gone through anyone?

A. I would have called Bill Crossan.

Q. Why would you call Bill Crossan?

A. He was our chief steward.

(Notes of Testimony, February 28, 1984, page 274.)

Therefore, the shift captains were not given any authority by the union other than recording the names of the strikers on the shift. In contrast to this, Crossan testified that he was the middleman between the picketers and Smalley, the business agent in charge of the strike. (Notes of Testimony, February 28, 1984, page 418.) The strikers looked to Crossan as the one in charge, and Defendants dealt with Crossan as the one in charge.

In addition to Crossan's activities on behalf of Defendants discussed above, Smalley would meet with Crossan when he visited the picket site and had frequent conversations with him. (Notes of Testimony, February 28, 1984, pages 422, 449.) On at least two occasions, Crossan accompanied Smalley as he walked around the picket site. On one occasion, Kendig also was present. (Notes of Testimony, February 28, 1984, page 422; February 29, 1984, pages 25-26.) Crossan, with the knowledge and consent of Defendants, actively assumed a leadership role. From such facts, the jury could reasonably infer that Crossan's authority as chief steward extended to the picket line as an agent of Local 107. The jury could also reasonably infer that from this actual authority and apparent authority given Crossan by Defendants at the picket site, that Crossan--and Kendig to a lesser extent--was Local 107's agent on January 25, 1980 when the shooting occurred.

ACTUAL PARTICIPATION OF LOCAL 107 AND IBT

Defendants next argue that even if Crossan or Kendig were determined to have authority, there is no evidence in the record that Local 107 or IBT actually participated in or authorized the events that led to Plaintiffs' injuries. However, the "actual participation in, or actual authorization of," standard comes from Section 8 of the Pennsylvania Labor Anti-Injunction Act, and we have determined that it is not applicable to this case.

In conjunction with this, Defendants assert that neither Local 107 nor IBT had a duty to control the picket line. As will be discussed hereafter, there was ample evidence from which the jury could find that Defendants organized, maintained and controlled the line. From this arose Defendants' duty to maintain and control it properly. The real issue before the jury was whether Defendants were negligent in carrying out that duty. Under the common law standard of agency, we find that there is sufficient evidence that the Defendant unions maintained and controlled the picket line (in a negligent manner) and that the acts of Crossan and Kendig, being within the scope of their agency, are attributable to Defendants.

Furthermore, even if Section 8 applies, we believe that the same evidence that satisfies the negligence standard is sufficient to support a finding that Defendants actually authorized or participated in the events of January 25, 1980.

Section 8 requires "clear proof" of Defendants' involvement. "What is required is proof, either that the union approved the violence which occurred, or that it participated actively or by knowing tolerance in further acts which were in themselves actionable under state law or intentionally drew upon the previous violence for their force." *United Mine Workers of America v. Gibbs*, *supra*, at 739. "An 'impression' is too ephemeral a product to be the result of 'clear proof.'" *United Mine Workers of America v. Gibbs*, *supra*, at 741. Defendants assert that Plaintiffs have created only a vague "impression" of agency that as a matter of law is insufficient to create liability. We disagree.

Although Defendants maintain that until the late afternoon of January 25, the picket line was peaceful, there is some evidence of minor violence and vandalism before this date. It is not clear from the record whether these incidents were caused by the strikers or by people living near the plant. (Notes of Testimony, February 27, 1984, pages 14-15, 53.) Nevertheless, Joseph Cimino, president of Local 107, was aware of these isolated incidents (Notes of Testimony, March 1, 1984, page 251), as was John Smalley, the business agent. (Notes of Testimony, February 28, 1984, pages 391-392.)

There is ample evidence of the drinking of alcoholic beverages at or near the picket line, contrary to the instructions of union leaders. There is also sufficient evidence to support a finding that Defendants were aware of the drinking, but did little, if anything, to stop it.

Cimino testified that the union would not tolerate drinking on the picket line. He stated that he personally instructed members as to this. (Notes of Testimony, February 28, 1984, pages 309-310.)

Smalley also testified that he told the strikers that there was to be no drinking. Although he was aware that drinking was being done and it was his responsibility to control the picket line, he stated that he could do no more than tell the union members to stop.

Q. Okay. When you went there in the morning, did you observe cans and beer cans and liquor bottles in the trash barrels or around the trash barrels?

A. During the length of the strike on two or three occasions on top of the ashes in the trash barrel I saw cans and upon seeing the cans I told the people whatever mornings they were that were on duty to pass the word down the line that again, I repeated I don't want any drinking on the picket line.

Q. Now, who would you tell in the morning when you saw those cans?

A. Everybody who was picketing.

Q. Do you remember any one person who you told?

A. No.

Q. Can you remember any one person that you probably told because you remember he was there?

A. Whoever was picketing I addressed myself to all of them.

Q. So you would see cans there and you would call everybody together?

A. No, they were there. There was two or three occasions on top of ashes where I saw empty beer cans on top of the ashes in the drum, and everybody was there picketing, and I told them pass the word down the line I don't want any drinking here.

Q. On the second occasion when you saw it did you say to them I thought I told you guys the last time?

A. I don't remember what I said to them, but I am sure I mentioned it to them.

Q. On the second or third time you saw it did you take any action when you saw this passing it down the line wasn't enough?

A. The only action I could take was to tell them what I told them. I wasn't a boss or a manager. I wasn't their parent. They were adults. They weren't children.

Q. Who had responsibility to control the picket line?

A. I did. (Emphasis added.)

(Notes of Testimony, February 28, 1984, pages 388-390.)

During the late afternoon of January 25, 1980, Smalley was notified by William Mahoney, personnel manager at 3M, that an incident of rock and bottle throwing had taken place and that air had been let out of the tires on employees' cars. He did nothing about it because, he stated, Mahoney told him the situation had quieted down. (Notes of Testimony, February 28, 1984, pages 394-395.)

The evidence presented at trial was more than sufficient to demonstrate Crossan's negligence as well as his authorization of and participation in the shooting and the events leading up to it.

Q. And you were drinking?

A. (Crossan) Yes.

Q. And you knew you were not supposed to be drinking on the line; am I right?

A. Yes.

Q. And you see Mr. Kendig with a gun the second time, it's now out of the van. He now asks you to shoot out the lights. You knew that what Mr. Kendig was doing was doing [sic] was directly contrary to everything that that line stood for; is that right?

A. Correct.

Q. You knew, I assume, that people can get hurt when guns go off; am I right?

A. Yes.

Q. You knew that those people out there were the very same friends that you were partying with an hour earlier; am I right?

A. Correct.

Q. You knew that help was just four feet away inside the trailer; am I right? Like making a telephone call; am I right?

A. Yes.

Q. But you did nothing other than hand him back the gun?

A. That's what I did.

(Notes of Testimony, February 29, 1984, pages 22-23.)

Crossan knew that a gun had been brought to the picket line. He handled it himself. He heard the first series of shots fired, before those that hit Plaintiffs but he did nothing about it. (Notes of Testimony, February 28, 1984, pages 441-442.) As Defendants' agent, with actual and apparent authority over the picketers this conduct by Crossan constituted more than negligence it showed actual involvement by Defendants.

Defendants argue that the shooting was an unforeseeable and isolated incident. However, evidence demonstrates that the shooting was the culmination of Defendants' negligent maintenance of the picket line. Defendants failed to enforce their own policies regarding drinking, violence or congregating on the picket line.

The atmosphere on the picket line in the hours prior to the shooting was not one of tranquility in which a senseless shooting suddenly occurred. The strikers were drinking. Crossan himself asked someone to go for more beer. (Notes of Testimony, February 28, 1984, page 430.) Crossan and Kendig attempted to give out leaflets on 3M property and were warned off by the

security supervisor. (Notes of Testimony, February 29, 1984, pages 76-77.) Rocks and bottles were thrown at the guardhouse.

There were more picketers on the line than usual. One of the strikers testified that he was told by Ballinger to "try to get a couple extra bodies down for that evening." (Notes of Testimony, February 27, 1984, page 122.) Henry Mason, another picketer, testified that Crossan made phone calls and instructed others to do so. (Notes of Testimony, February 28, 1984, pages 186-187.) Mason also testified as follows:

Q. All right, could you describe the atmosphere on the picket line right at the time of the rocks and bottles being thrown?

A. We were -- it was tense. I mean, when you say the atmosphere we were getting progressively rowdier as a whole. It was almost turned into a mob scene.

(Notes of Testimony February 28, 1984, pages 189-190.)

Q. And were Mr. Crossan and Mr. Kendig on the picket line or on the scene around the picket line the whole time during your shift?

A. No, they left or at least once that I know of.

Q. Okay. Now, did anything happen with regard to the atmosphere when they left?

A. Yes. Everything calmed down. There was no more bottles being thrown. It just we just like relaxed.

(Notes of Testimony February 28, 1984, pages 192-193.)

There is also circumstantial evidence of agitation among the higher ranking union leaders that supports the jury's finding that Defendants authorized or participated in the events of January 25.

By the day in question, the strike had been in progress for ten weeks with no settlement in sight. One of the key issues was 3M's insistence on the elimination of the "wage survey" which was then contained in the collective bargaining agreement. On January 22, 1980, Cimino attended a meeting in Washington, D.C. with Robert Hanson, a representative of 3M, Nelson

Schmidt, legal counsel for 3M, Norman Weintraub, an economist with the International union, and Joseph Cotter, an International union staff member to discuss this issue. As a result of the meeting, Hanson and Cimino agreed to reevaluate their positions and to follow up with one another by telephone. (Notes of Testimony, February 29, 1984, pages 162-169.)

A day or two after the meeting, Hanson unsuccessfully tried to telephone Cimino. He then called Cotter and asked him to have Cimino call Hanson. Cotter contacted Cimino and Cimino, in turn, called Hanson on January 25. (Notes of Testimony, February 29, 1984, pages 169-172.) Hanson's handwritten notes of the conversation were introduced into evidence by stipulation and read as follows:

> Joe Cimino called me answering my call to Cotter. Summary of conversation: We need all 13 items I gave you yesterday. People are adamant and strong. I've spent a lot of time on picket line. They won't go back to work for a few cents. I've got to represent them. We're going to extend our picketing. I've got approval from the Intl. We're going to do what we have to do--it's been peaceful for ten weeks--it's getting hot now--they are up tight--we've got to get mgmt's attention. I have no malice--I won't lie to you or sandbag you. These people don't like being 2nd class citizens--they compare rates and benefits with St. Paul, and other three plants & don't like being behind. Everybody has sick days these days. You get injunction & then tell us where you're shipping all boxcars--it's written on cars "To Anchor" or "To Leno"--that's really rubbing salt in wounds. First time they're doing it. We're having a demonstration Mon. in Phil. -- 95% of 3M will be there and some truck drivers.

(Plaintiffs' Exhibit 28, page 2.)

At about this same time, Cimino decided to extend the picket lines to other 3M plants to put more pressure on the company. The Union was also organizing a public demonstration to take place the week following the shooting.

Plaintiffs argue that Cimino's statement that, "We're going to do what we have to do--it's been peaceful for ten weeks--it's getting hot now . . ." is sufficient circumstantial proof when taken together with other Union activity to support a finding that Defendants authorized or participated in the instigation that led to the shooting.

Defendants contend that the above statement referred only to lawful strike actions and rely on Cimino's testimony as follows:

A. By getting hot I meant that we had been on the picket line a long time. Nothing was happening. We weren't getting anywhere trying to negotiate.

By "getting hot" meant exactly what I told him, that we were going to extend the picket line to North Carolina, Chicago, Minnesota, New Jersey and as well as that, I believe I recall that I told him that I guess he didn't keep them as part of the notes, that I was planning to have a march on the NLRB in Philadelphia that following Monday or Tuesday, whatever day it was, and in addition to that I told him that in order to draw attention and show them that we were meaningful, that we were going to put pamphlets out to boycott.

Q. To whom? To employees or the consumer?

A. Consumer.

Q. To the public?

A. Yes.

Q. Did you do that?

A. Yes, we did.

Q. Did you extend your line in fact?

A. Yes, we did.

(Notes of Testimony, February 28, 1984, pages 353-354.)

Whether Cimino's statements referred to the lawful strike actions or the violence that took place at the picket site was for the jury to decide. Both were sufficiently close in time to the statements that the jury could reasonably infer that either or both were what Cimino meant. It is the province of the trier of fact to pass upon the credibility of witnesses. The fact finder is free to believe all, part or none of the evidence. *Com. v. Stockard*, 489 Pa. 209, 213, 413 A.2d 1088 (1980).

Defendants next assert that even if Local 107 is liable under the applicable standard of proof, the record is devoid of any evidence creating a nexus between IBT and the events of January 25, 1980. We find, however, that there is sufficient evidence to establish the liability of IBT both under the common law negligence standard and Section 8 of the Pennsylvania Labor Anti-Injunction Act.

IBT is a separate Defendant whose liability for the shooting incident must be determined apart from that of Local 107. However, the liability of the parent union may be established by common law agency principles where, as here, there is clear proof that the Local Union was responsible for Plaintiff's injuries and that the Local Union is the agent of the International due to 1) the International's domination and control over the Local, and 2) the International's direct involvement in the events forming the basis of this action.

As to the Section 8 standard, the Supreme Court has stated:

> The argument might be made that if there were "clear proof" that the local union was responsible, the responsibility of the international union vis-a-vis its local would be governed by a less demanding standard than that applicable for determining the responsibility of a labor organization or its officers on the basis of the acts of "individual officers, members, or agents" of the organization. Since the local was not a party here, we have no occasion to assess this issue.

United Mine Workers of America v. Gibbs, supra, at 737 n.28.

In the present action, Local 107 is a party Defendant and there has been sufficient evidence presented to support the jury's finding by clear proof of its liability. We find that the identical evidence which establishes IBT's liability under the common law also demonstrates its liability under the Section 8 standard.

The evidence at trial established that Local 107 is dominated and controlled by IBT through its constitution. (Plaintiffs' Exhibit 27, hereinafter P27.) The purpose of this International Union is set forth as follows:

> The objects of this International Union are to organize under one banner all workers engaged in industry; to educate them to cooperate in every movement which tends to benefit the organization; and to impress upon

> our membership, employers and the public that it is to the advantage of all concerned that workers be organized. (Emphasis added.)

(P27, page 2.)

Members of Local 107 are members of IBT. (P27, page 4.) A local union must accept as a new member any member in good standing with another local of the International Union with a valid transfer card. (P27, page 109.)

The General Executive Board of the International has jurisdiction to try individual members and officers as well as Local Unions for offenses committed against the International Union. The jurisdiction of the International Union supersedes that of any subordinate body, such as the Local Union, whose authority terminates once the International Union assumes jurisdiction. Charges may be brought against a member, officer, business agent or Local union for a variety of reasons including violation of any specific provision of the International Constitution or failure to perform any of the duties specified thereunder. The penalties that may be imposed consist of reprimands, fines, suspensions, expulsions and so forth. (P27, pages 122-125.)

The by-laws of a local union must comply, and may not conflict, with the provisions of the International Constitution. (P27, page 132.) The by-laws of Local 107 expressly state:

> The Local union acknowledges that the Constitution of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America supersedes any provision of these By-laws herewith or hereinafter adopted which may be inconsistent with such Constitution. The Local Union hereby readopts, as its Constitution, such International Constitution, and incorporates herein by reference, as though fully set forth herein, all such provisions of such Constitution, as it may be interpreted, modified, or amended from time to time, which are applicable to Local Union matters and affairs and shall perform all the duties imposed upon a Local Union by such Constitution.

(Plaintiffs' Exhibit 26, Section 24.)

The International Constitution also regulates the number and kind of officers of the Local Union, the term of office and the nomination and election of officers. (P27, pages 132-139.)

A local union may not become involved in a strike, boycott, lawsuit or any serious difficulty, without prior notification to its area Joint Council[2] which in turn must notify the General President of the International Union of the steps the Joint Council has taken to approve or disapprove the contemplated action. The General President is authorized to approve, disapprove or modify the action of the Joint Council. (P27, pages 76-77.) The International Constitution stipulates that a settlement offer can be rejected only by a 2/3 vote of the membership (P27, page 74), and provides for the payment of out-of-work benefits for Local union members during the strike. (P27, page 78.)

Finally, if the International's General President believes that any officers of a Local Union are dishonest or incompetent, or that the Local Union is not being conducted in accordance with the Constitution and laws of the International Union, he may appoint a temporary Trustee to take charge and control of the Local Union and set a hearing date on the matter. (P27, pages 31-32.) The Trustee is authorized to take full charge of the affairs of the Local Union and to report on such affairs and transactions of the Local Union to the General President. (P27, page 33.)

In addition to the pattern of domination of Local 107 by IBT outlined above, there was sufficient evidence from which the jury could reasonably infer the direct involvement by IBT in the events culminating in the shooting incident. There was testimony, for example, that on the day of the shooting Cimino discussed his plans for extending the picketing line with Cotter from the International union, then followed this up with the phone conversation with Hanson, discussed above, in which he stated, "[I]t's getting hot now ... we've got to get mgmt's [management's] attention." (Notes of Testimony, February 28, 1984, pages 331-333.)

There was sufficient evidence for the jury that Local 107 is under the International Constitution and in reality, a component of IBT and in no significant way a separate and autonomous entity. IBT consists of an unlimited number of Local Unions chartered by the International as "one great labor organization" to protect and advance the welfare of workers. (P27, page 1.)

IBT was directly involved in Local 107's strike, as stipulated by its Constitution. It was paying strike benefits to workers. It was involved in the meeting in Washington, D.C. It was aware of Local 107's intention to extend its picketing to other 3M facilities and to hold a public demonstration.

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[2] Whenever three or more Local Unions are located in one city, they form a Joint Council which has certain judicial powers. (P27, pages 94-98).

These contacts, in addition to the control of Local 107 by IBT through its Constitution, are sufficient to establish an agency relationship between the two and render IBT liable under the common law as well as under Section 8, for Local 107's actions in maintaining the picket line.

[Conclusion of Opinion in October 11th issue.]

FORESEEABILITY

Defendants next content that, assuming they were subject to a common law tort duty, the events of January 25, 1980 were not reasonably foreseeable and, therefore, they cannot be held responsible.

Defendants argue that there is no presumption under the law that the mere existence of a picket line will inevitably lead to violence. They state that thousands of such picket lines are established and maintained each year by labor organizations throughout the United States without a hint of violence, vandalism, or untoward conduct. While this may be true, nevertheless, in the present action, there was evidence, giving much more than a hint, of vandalism, drinking and other conduct at the 3M picket site of which Defendants were aware that made the resultant shooting reasonably foreseeable.

The mere happening of an accident or incident is not evidence of negligence. The test of negligence is whether Defendants could have anticipated and foreseen the likelihood of harm to Plaintiffs, resulting from their acts. *Brusis v. Henkels*, 376 Pa. 226, 228, 230, 102 A.2d 146 (1954). It is a cardinal rule of law that want of ordinary care consists of failure to anticipate what is reasonably probable, not what is remotely possible. *Id.* at 230.

The injuries suffered by Plaintiffs were the foreseeable result of the introduction of a weapon onto a picket line that had already erupted into violence during a prolonged winter strike. The evidence demonstrates that union officers were aware of the possibility of violence throughout the strike.

Smalley testified as follows concerning the meeting at which the strike vote was taken:

I told them that, to the best of my recollection, based on the company's feeling at the bargaining table, and it could be a lengthy strike, that I didn't

expect any incidents on the strike. I didn't expect nothing other than an orderly, neat picket line.

(Notes of Testimony, February 28, 1984, page 376.)

Crossan testified as follows:

I believe Jack Smalley just gave a short speech at that meeting. I believe it was at that time he just said there would be no violence or whatever, carrying on at the picket line.

(Notes of Testimony, February 28, 1984, page 416.)

As discussed above, business agent Smalley was aware of the isolated incidents of vandalism before January 25, 1980, for example, nails found in the parking lot. (Notes of Testimony, February 28, 1984, pages 391-392.) He was also aware of the drinking continually going on, contrary to his instructions. Crossan was participating in this drinking. These actions, tolerated on the picket line by those who could have acted to prevent them, created the atmosphere of increasing tension in which the shooting foreseeably occurred. Smalley's awareness of the risk of harm, even limited to January 25, was sufficient for the jury to find that the harm was foreseeable. Smalley testified as fellows regarding a telephone call from Mahoney, personnel manager at 3M, concerning events earlier in the day:

A. Mr. Mahoney said words to the effect, "Jack, I wanted to tell you we had an incident of --" I don't know whether he said rocks or bottles being thrown through a window.

"We had some air let out of some tires on the lot."

He said it was hairy for a few minutes, but everything quieted down and for the last hour or so it's been fine, "But I just thought I should let you know."

(Notes of Testimony, February 28, 1984, pages 394-395.)

Q. What did you do after Mr. Mahoney called you and told you a bottle or rock had been thrown through the window?

A. When he said it was hairy for a little while and everything was fine, I went about doing my regular work.

Q. Did you try to contact anyone on the line?

A. No, I did not.

Q. Did you try to go out on the line?

A. I didn't feel there was a need.

Q. But you didn't go out?

A. I did not go out, no.

(Notes of Testimony, February 28, 1984, page 395.)

Although Mahoney testified that he did not recall telephoning Smalley (Notes of Testimony, February 29, 1984, page 119), it is for the jury to pass upon the credibility of witnesses and the weight to be accorded the evidence produced.

As to Crossan, there has been ample evidence recounted in this opinion to demonstrate his knowledge of the risk of harm. He knew that Kendig had brought a gun to the picket line. He handled it himself, then handed it back to Kendig who he knew had been drinking. Defendants argue that when the gun appeared on the picket line, no one who was aware of its existence called the Union. This argument is not persuasive. Once Crossan, Defendants' agent, was aware of the gun, the Union was aware.

Defendants also take issue with what they assert is the linchpin of Plaintiffs' foreseeability argument, that the mere consumption of alcohol, without intoxication, creates a volatile situation that can only lead to violence. We disagree. The presence of alcohol at the picket site, tolerated by Defendants although in direct violation to their policy of no drinking on the line, was simply further evidence of their negligent maintenance of the line and one factor to be considered under the foreseeability issue. It is the totality of the circumstances--the prolonged strike, the constant drinking, the rock throwing incident and so forth--that made the injuries here a foreseeable consequence. Violence and injury were not so irrational or unpredictable given the circumstances as to be unreasonably foreseeable.

In connection with the above, Defendants also argue that as a matter of law, a principal cannot be held liable for the violent acts of its agent that are totally without responsibility or reason. Defendants assert that the courts of this Commonwealth have consistently refused to impose liability upon a master for the excessive and dangerous conduct of its servant.

Defendants cite *Lunn v. Yellow Cab Company*, 403 Pa. 231, 235, 169 A.2d 103 (1961) in which the Court held the following:

> Also, "Where, within the scope of his employment, a servant uses unreasonable means, the master, in certain circumstances, may still be liable" . . . *Where, however, the employee commits an act encompassing the use of force so excessive and dangerous, as to be totally without responsibility or reason under the circumstances, the employer is not liable as a matter of law* . . . If the act of assault, although a means of accomplishing an authorized result, is done for personal reasons or in an outrageous manner, it is not done within the scope of the employment. The fact that the act was done in an outrageous manner is indicative that the employee is not actuated by any intent of performing the business of his employer, but rather, that it is done solely through his own private malice. . . . (Emphasis added.)

In *Lunn*, the plaintiff had been stabbed by a cab driver. Under the facts of the case, the Court held that the vicarious liability of the cab company did not exist as a matter of law.

In applying the above to the present case, Defendants argue that the conduct of Crossan and Kendig is indistinguishable from that of the cab driver in *Lunn*. Defendants assert that there is absolutely no evidence in the record indicating that violence or the use of violence fell within the acceptable or permitted course of conduct on the picket line and that it defies logic and common sense to conclude that even if Crossan and Kendig were charged with the maintenance of a peaceful picket line, that that charge included the senseless and unnecessary use of a gun. Therefore, Defendants argue that the events of January 25, 1980 constituted "the use of force so excessive and dangerous" and were so totally without responsibility or reason that Local 107 and IBT cannot be held liable as a matter of law for those acts.

Although we do not disagree with Defendants' statement of the law in this area, we do disagree with their assessment of its application to the facts before us. Plaintiffs never contended that Crossan or Kendig pulled the trigger.

Rather, the evidence established unequivocally that Kendig brought the gun to the picket site and that Crossan handled it and allowed it to remain there. These facts taken together with 1) the other evidence of Crossan's and Kendig's actions, drinking, letting air out of tires and so forth, and 2) the authority Crossan and Kendig had at the picket site formed the basis for a finding of Defendants' negligent maintenance of the picket line for which they are liable.

These actions, however, were not so excessive and dangerous as to be taken out of the scope of authority given Crossan and Kendig. Nor was there any evidence of personal reasons for the shooting. However, there was evidence from which the jury could infer that the violent acts committed on January 25, 1980 were connected with union activity. For example, one picketer testified, "We were going to try to create a little action to see if we could get some results as far as through the company." (Notes of Testimony, February 27, 1984, page 125.) Crossan had general authority at the picket site and Defendants are liable for the negligent manner in which he exercised that authority.

MEMBERS SUING UNINCORPORATED ENTITY

Defendants next contend that given their membership in Local 107 and IBT, Plaintiffs Gajkowski and Schipske may not maintain an action to recover for their personal injuries because such injuries were sustained in the course of their participation in union activities.

Defendants base their argument on the fact that Local 107 and IBT are unincorporated associations and rely on *DeVillars et vir v. Hessler et al.*, 363 Pa. 498, 70 A.2d 333 (1950).

In *DeVillars*, the Pennsylvania Supreme Court addressed the question of the right of a member of an unincorporated association to recover from it for injuries sustained through a tort committed by other members in carrying out an association project. The plaintiff was a member of the unincorporated fraternal association and acted as its secretary. She was injured while participating in an endeavor of the association to raise funds, namely she was to cook at a county fair during which a gas steam table provided for her use exploded, causing her injuries. Defendants were the master, the overseer, the treasurer and members of the executive committee of the association.

The Court held the following:

> The legal identity of these officers and committeemen is wholly distinct from their identity as individuals, so it must be assumed that they were joined as defendants merely in their capacity as representatives of the Grange and not as persons as to whom individual liability was sought to be asserted.
>
> The real question in the case therefore resolves itself into whether this action can be maintained against the *association* on the ground that the members who allegedly committed the tort were acting on its behalf and for its benefit. The weakness of plaintiffs' case, from the legal standpoint, arises from the fact that not only was the wife plaintiff an active participant in the general conduct of the concession at the fair but she voluntarily assumed a participating role in the operation of the steam table. Being thus cooperatively engaged with those who were allegedly guilty of negligence she became subject to the legal principal that where persons join in the prosecution of a common enterprise there is thereby created a mutual relationship of agency among them, with the result that the negligence of any of them is imputed to each and all of them. Since, therefore, the negligence of which she complains is legally imputed to herself, she cannot recover from the association or from any of its members, other than, as already stated, the individuals who actually committed the tort which caused her injuries.

DeVillars et vir v. Hessler et al., *supra*, at 500-501.

In reaching the above conclusions, the Court relied on its earlier decision of *Roschmann v. Sanborn*, 315 Pa. 188, 172 A. 657 (1934) in which a member of an unincorporated fraternal association was injured while participating in a social excursion in a bus owned by the organization. The Court held that the injured member could not recover because the outing being a joint enterprise, the negligence of the bus driver was imputed to him the same as to all the other members of the organization. *DeVillars et vir v. Hessler et al.*, *supra*, at 501.

The *DeVillars* Court also cited, and Defendants rely on, *Hromek v. Gemeinde et al.*, 238 Wis. 204, 298 N.W. 587 (1941) in which one of the defendants was a labor union and the injured plaintiff was a member of the union. The Court there found the defendant union not liable and stated:

> All possible acts of negligence . . . are derelictions of officers of the union and these officers were not only acting for all of the other members of the

union but for plaintiff. Plaintiff is in no position to sue her co-principals for the derelictions of a common agent.

Hromek v. Gemeinde et al., supra, at 589-590.

However, since *DeVillars*, the Supreme Court of Wisconsin has modified *Kromek* in *Fray v. Amalgamated Meat Cutters, Etc.*, 9 Wis.2d 631, 101 N.W.2d 782 (1960). In *Fray*, a union member sued his union for negligently failing to represent him in his employment relations with his employer. The Court framed the issue as follows:

> The question presented is one of substantive law, i.e., whether the union being an unincorporated association can under some circumstances be liable to one of its members for the negligence of its agent. Assuming for the purpose of argument that one who acts for a union is the common agent of its members who are coprincipals, can it be said this concept of an unincorporated association should be applied to a particular situation where the facts will not support or justify its application? A critical examination of this theory leads one to ask what are the limits and the scope that should be placed on its application when applied to modern labor unions as they exist in fact today. It would seem the essential element of the theory is that the act or the omission to act complained of should be one which can reasonably be considered as done or omitted on behalf of the injured member. To say that an agent, who willfully or negligently violates a duty to his principal, acts on his behalf would be an unwarranted extension of the agency concept and certainly out of keeping with reality.

Fray v. Amalgamated Meat Cutters, Etc., supra, at 784-785.

After reviewing the law in this area, the *Fray* Court concluded that:

> We believe there may be fact situations when it would be unjust or unrealistic to apply the Hromek Case doctrine of imputation of a union officer's or agent's negligence to an injured member. In such cases the court should regard a union in legal contemplation as separate from its members, which in fact it is, and not apply a legal fiction which leads to an absurd result.
>
> We hold only upon this appeal that the Hromek Case doctrine does not exclude all possibility of an action by an injured member of a union

> against the union, virtually as an entity, arising out of the negligence of union officers or agents in the representation of the injured member in a grievance against his employer.

Fray v. Amalgamated Meat Cutters, Etc., supra, at 785-786, 787.

We agree with the *Fray* Court and will not apply a legal fiction which leads to an absurd result. Defendants argue that the fact that this matter involves activities of an unincorporated *labor* organization, rather than some other type of unincorporated association, is of no consequence. Defendants assert that the issue before us has been squarely decided and that we are duty-bound to follow *DeVillars and Roschmann*. We disagree.

The old Pennsylvania cases cited by Defendants involved unincorporated associations that are vastly different in substance from the modern day labor organization. The rationale underlying those decisions is inapplicable to the case before us. In 1950, in *DeVillars*, the Court considered the circumstances involved and the nature of the relationship between the association and the plaintiff in reaching its decision. The Court had before it a member of a fraternal association and an injury sustained while cooking at a county fair. We have before us a nationwide organization, composed of thousands of members, governed by a constitution that is 145 pages long and serious injuries sustained on a picket line negligently maintained by such organization. We cannot accept Defendants' argument that *DeVillars* is controlling here simply because the two cases concern unincorporated organizations. We must look at the Court's reasoning in *DeVillars* and such reasoning does not bar Plaintiffs' suit here. Under the *DeVillars* analysis, the modern labor union is an entity separate and apart from its membership.

The Supreme Court of California addressed the above issue in considering whether a member of an unincorporated labor union could maintain an action against the union for personal injuries caused by negligence of the union in maintaining a parking lot. The Court reviewed the theory that the union had no entity or existence apart from that of its members and concluded the following:

> Basically this rule has been arrived at by applying to other forms of voluntary, unincorporated associations the rules of law developed in the field of business partnerships. Under traditional legal concepts the partnership is regarded as an aggregate of individuals with each partner acting as agent for all other partners in the transaction of partnership business, and the

agents of the partnership acting as agents for all of the partners. When these concepts are transferred bodily to other forms of voluntary associations such as fraternal organizations, clubs and *labor unions, which act normally through elected officers and in which the individual members have little or no authority in the day-to-day operations of the association's affairs*, reality is apt to be sacrificed to theoretical formalism. The courts, in recognition of this fact, have from case to case gradually evolved new theories in approaching the problems of such associations, and there is now a respectable body of judicial decision, especially in the field of labor-union law, with which we are here directly concerned, which recognizes the existence of unincorporated labor unions as separate entities for a variety of purposes, and which recognizes as well *that the individual members of such unions are not in any true sense principals of the officers of the union or of its agents and employees so as to be bound personally by their acts* under the strict application of the doctrine of respondeat superior. (Emphasis added.)

Marshall v. International Longshoremen's and Warehousemen's Union, Local 6, District 1, 22 Cal. Rptr. 211,371 P.2d 987, 989 (1962).

Although a labor union is technically an unincorporated organization, it is obvious that the similarity ends there between IBT and Local 107 and the small social or fraternal associations contemplated by the Court in *DeVillars* and *Roschmann*. The modern labor union, particularly one the size of IBT, lacks that aspect of voluntary participation that was vital to the reasoning utilized by the Court in *DeVillars*. Therefore, since that reasoning is inapplicable to the case before us, *DeVillars* is not controlling here and Plaintiffs Gajkowski and Schipske were not barred from maintaining this action.

ADMISSIBILITY OF EVIDENCE OF DRINKING

Defendants next argue that it was error for the Court to admit evidence of the consumption of alcoholic beverages at the 3M picket site during the ten-week strike period. Specifically, Defendants contend that such evidence was prejudicial and, as a matter of law, inadmissible because 1) the consumption of alcohol is not admissible unless it reasonably establishes intoxication and 2) Plaintiffs evidence did not establish the necessary degree of intoxication.

Defendants cite *Sentz v. Dixon*, 224 Pa. Superior Ct. 70, 72, 30 A.2d 434 (1973) in which the Court stated:

> [I]t has continuously been the policy of our appellate courts that, while proof of intoxication is relevant where recklessness or carelessness is at issue, great care should be taken as to whether to admit evidence of drinking and the mere fact of consuming alcohol is not admissible, being unfairly prejudicial, unless it reasonably establishes intoxication.

However, a further reading of the case discloses the following and demonstrates that the above rule does not apply to the case before us.

> The court below attempted to distinguish these cases, stating that they "involved the operation of automobiles and the fitness of the operators [and that] [t]here was no operation of a motor vehicle by the plaintiff involved in this case, ..." This distinction is insubstantial and untenable. Although the allegedly intoxicated party here was a pedestrian, rather than the driver of an automobile, the question of intoxication still relates to his recklessness or carelessness in conducting himself at the time he was struck by appellee's vehicle. The factual issue involved is similar to that in the cited motor vehicle collision cases, e.g., was appellant *intoxicated to a degree showing recklessness or carelessness* which might relieve appellee of liability due to appellant's contributory negligence (Footnote omitted.)

Sentz v. Dixon, *supra*, at 73.

In the present action, the evidence of drinking was not introduced to show that there was an intoxicated party or to relate his intoxication to his reckless or careless conduct. Rather, the evidence of drinking was probative of Defendants' negligence in maintaining the picket line which they had established and controlled. Defendants, by their own admission, had a rule against drinking at the picket site. Obviously, this rule was made for a reason. Nevertheless, the rule was broken continuously and with Defendants' knowledge. Plaintiffs offered the evidence to prove that by tolerating drinking on the picket line, Defendants, as institutions, were negligent. The risks inherent in the situation were clearly foreseeable to Defendants or they otherwise would not have had a policy against drinking. The Defendants' disregard of their own policy was plainly admissible.

Defendants reliance on *Miles v. Ryan*, 484 F.2d 1255 (3d Cir. 1973) is also misplaced. Defendants argue that the prejudicial impact of evidence of the consumption of alcohol without the concomitant proof of intoxication has

been recognized in other areas of the law besides that dealing with motor vehicle accidents. In *Miles*, the Court considered the question in relation to the testimony of a witness and concluded that the proof of the witness' consumption of alcohol prior to witnessing the events testified to, had to reasonably establish a degree of intoxication which affected the capacity of the witness to observe and remember. *Miles v. Ryan, supra*, at 1257-1258. As in *Sentz*, the Court in *Miles* had before it a question involving an allegedly intoxicated party and the relationship between his intoxication and conduct. No such question is before this Court concerning Defendants.

Assuming, nevertheless, that evidence of alcoholic consumption would be inadmissible unless it reasonably established intoxication, we believe that there is sufficient testimony in the record to support a finding of intoxication of certain persons at the picket site.

In addition to other testimony and video evidence, Defendants quote Officer Stephen Whiteman who testified as follows:

Q. You didn't see any of them [picketers] in what you would call heavily intoxicated or intoxicated condition?

A. Not that I felt were intoxicated.

Q. They were drinking, but there was no evidence that they were drunk that you saw?

A. Not that I believe I saw.

Q. That is true right up to January 25, 8:30-35 in the evening?

A. There was no one arrested for public drunkenness.

(Notes of Testimony, February 27, 1984, pages 57-58.)

Q. Did Mr. Ballinger have a steady gait when you spoke to him right after this?

A. Mr. Ballinger did not strike me as being intoxicated.

Q. Did it occur to you Mr. Ballinger was in fact drunk at 8:35 that night?

A. He had been drinking, but I didn't feel he was intoxicated.

(Notes of Testimony, February 27, 1984, page 63.)

However, the record also contains the following testimony of Richard Lloyd:

Q. Now, focusing around 8:00 that evening, was it again your assessment, from what you saw, that Mr. Ballinger was in fact drunk at that time?

A. Yes.

(Notes of Testimony, February 27, 1984, page 127.)

Testimony of Henry Mason:

Q. Describe to the Jury Mr. Ballinger's condition that you saw?

A. He was sloppy drunk would be the word. He was teetering. He was spilling his own drink on him. He talked, he was slurred.

(Notes of Testimony, February 28, 1984, page 182.)

It is not for this Court to resolve the inconsistencies in the testimony. It is the function of the jury to weigh the evidence and as fact finder, the jury is free to believe all, part or none of the evidence.

Additionally, the Court gave the following cautionary instruction in its Charge to the jury:

There has been evidence in this case of the consumption of alcoholic beverages. You may consider that testimony, if you feel it aids your deliberations. However, there is no presumption of [sic] all that the consumption of alcohol inevitably leads to violence, but you must consider all of the evidence, and you must consider what part, if any, the consumption of alcohol played with respect to the relevant factors in this case.

(Notes of Testimony, March 1, 1984, page 286.)

CHARGE OF THE COURT

Defendants argue that the Court's jury instruction on the issue of comparative negligence was erroneous as a matter of law. The jury was asked to evaluate the relative negligence of Plaintiffs Schipske and Gajkowski on the one hand and that of Local 107 and IBT as a combined entity on the other. Defendants argue that Local 107 and IBT are joint tortfeasors and it was the jury's function to apportion the degree of negligence between all of the Defendants found negligent and Plaintiffs. We disagree.

The Comparative Negligence Act, 42 Pa. C.S.A. §7102 (b), provides in relevant part:

> Where recovery is allowed against more than one defendant, each defendant shall be liable for that proportion of the total dollar amount awarded as damages in the ratio of the amount of his causal negligence to the amount of causal negligence attributed to all defendants against whom recovery is allowed. The plaintiff may recover the full amount of the allowed recovery from any defendant against whom the plaintiff is not barred from recovery. Any defendant who is so compelled may pay more than his percentage share may seek contribution.

Defendants cite no other law but rely on the above statute to support their argument. However, although IBT is a separate Defendant, its liability is grounded on common law agency principles. Therefore, all negligent acts of Local 107 are attributable to IBT and for the purposes of comparative negligence IBT, and Local 107 are a single entity whose conduct must be weighed against that of Plaintiffs.

In light of this, the Court's instructions to the jury were not erroneous and were in compliance with Section 7102 (b) above. The charge read in part as follows:

> Now, if you find that either Plaintiff, either Mr. Schipske or Mr. Gajkowski, or both of them were contributorily negligent and that such contributory negligence was a substantial factor in bringing about their injuries, then of course, you must apply what is called the comparative negligent act which provides as follows:
>
> > The fact that a plaintiff may have been guilty of contributory negligence does not bar recovery if that negligence was not greater

> than the negligence of the defendant or defendants against whom recovery is sought, but any damages sustained by the plaintiffs shall be diminished in proportion to the amount of negligence attributed to the plaintiffs.
>
> Therefore, for the plaintiffs, Mr. Schipske and Mr. Gajkowski, it will be include [sic] on their verdict sheets several additional questions. One question is labeled question A in which you will be asked whether or not the particular plaintiff was negligent and whether that negligence was a substantial factor in bringing about his injury. If you answered "yes," to this question for either or both plaintiffs, you will be asked in question B to assign relative proportions to the negligence attributable to the plaintiffs and defendants . . .
>
> But basically you will decide in questions 1 and 2 whether the plaintiffs have established whether Local 107 was negligent, whether the plaintiff has established whether the IBT was negligent, and if they were, whether the plaintiffs themselves were negligent and whether that was established by the defendants, and if they did, what the proportions are of liability....

(Notes of Testimony, March 1, 1984, pages 282-283.)

Defendants next contend that the Court erred by instructing the jury that it could find them liable on the basis of ratification.

During the trial, the Court ruled that ratification under Section 8 was not an issue before it and consistently excluded any evidence or arguments by Plaintiffs on this subject. However, in its charge to the jury, the Court used the wording of Section 8, in stating that Plaintiffs must establish that the acts charged were "actually authorized, actually participated in by, or ratified after actual knowledge" by Defendants. (Notes of Testimony, March 1, 1984, page 284.)

Although no objection is of record, Defendants now argue that the inclusion of the word "ratified" three times during the lengthy charge was reversible error because it introduced an entirely new theory of liability. If such was error, it was harmless at most. Ratification was clearly not an issue. No evidence of it was presented to the jury, as Defendants acknowledge. It clearly was not the thrust of Plaintiffs' argument, Defendants' argument or the

charge to the jury as a whole. It cannot reasonably be argued that the inclusion of the word could have influenced the jury's verdict.

Defendants also argue that the Court committed reversible error by instructing the jury that it could consider the evidence of the consumption of alcohol in its deliberations. As the evidence was properly admitted, the jury could certainly consider it and, therefore, there was no error.

DAMAGES

Defendants next argue that Plaintiffs have failed to present sufficient evidence in support of certain of their damage claims to warrant consideration by the jury. As a consequence, Defendants contend that the jury's verdict was the product of speculation and conjecture and necessitates a new trial. Specifically, Defendants submit that there was insufficient evidence on the issues of past wage loss and future wage loss for Plaintiffs Abate and Gajkowski, loss of pension benefits and future medical expenses for Abate, and incidental expenses for both Abate and Gajkowski.

The law in Pennsylvania in this area is clear:

> The plaintiff has the duty and burden to establish by proper testimony the damages which he claims to have sustained, and if he fails to meet this burden, the question of damages cannot be submitted to the jury . . . The amount and items of pecuniary damage cannot be presumed but must be proved by the establishment of facts . . . It is the burden of the plaintiff to establish by evidence such facts as will furnish a basis for the legal assessment of damages according to some definite and legal rule. (Citations omitted.)

Gordon v. Trovato, 234 Pa. Superior Ct. 279,282, 338 A.2d 653 (1975).

Plaintiffs have met their burden here. The damages portion of this trial alone lasted for two days. While the Plaintiffs' presentation of their evidence was not done in the most artful manner, nevertheless the evidence was sufficient for the submission of the question to the jury. Additionally, it was sufficient evidence from which the damages could be assessed with reasonable certainty and led to a jury verdict that was not the product of speculation and conjecture.

As to the loss of wages, Abate testified as to his income in 1980, the year of his injury, including salary, overtime pay and payment for "odd jobs." (Notes of Testimony, March 5, 1984, pages 4-5.) The personnel director of 3M testified to the salary structure for security guards from 1979 until the present. (Notes of Testimony, March 6, 1984, pages 241-245.) Further, there was sufficient evidence from which the jury could conclude that Abate was incapable of working after his injury.

Sufficient testimony was offered regarding Plaintiff Gajkowski's income structure by both Gajkowski and the personnel director from which the jury could reasonably calculate his lost wages. (Notes of Testimony, March 6, 1984, pages 248-250, 334-336.) The jury was instructed that Plaintiffs were entitled to compensation for lost wages as a result of their injuries only if the amount was established by a preponderance of the evidence. (Notes of Testimony, Charge of the Court, March 6, 1984, page 8.)

As to future earning capacity, there was sufficient evidence to support a finding that both Abate and Gajkowski sustained permanent injuries. (Notes of Testimony, March 6, 1984, pages 216-217, 238-239, 297). There was also sufficient evidence to demonstrate that their injuries impair each's ability to work. In addition, both Abate and Gajkowski testified to their education and work experience. (Notes of Testimony, March 5, 1984, pages 3-4, 106-107.) A vocational psychologist also testified concerning Abate's background and future economic prospects. (Notes of Testimony, March 5, 1984, pages 184-185, 191-196.)

Defendants' other claims concerning damages are equally without merit. There was evidence from which the jury could find that Abate suffered a loss of future pension benefits by his early retirement due to his injuries. (Notes of Testimony, March 6, 1984, pages 245-248.) As to future medical expenses, the jury was charged that it could consider such expenses only if it found "any were established," (Notes of Testimony, Charge of the Court, March 6, 1984, page 7), and there was evidence from which the jury could make such a finding. (Notes of Testimony, March 6, 1984, pages 238-239.) Plaintiffs established by their evidence such facts as furnished a basis for the jury's assessment of their damages.

Defendants also contend that the jury's award of $12,000 to Plaintiff Schipske was excessive.

The Pennsylvania Superior Court in discussing excessive verdicts has stated the following:

> In evaluating such an argument, it is clear that each case is to be decided according to its unique facts and circumstances . . . Moreover, the granting or denial of a new trial on this ground is within the discretion of the trial court and will not be reversed in the absence of a clear abuse of discretion . . . Our Court will not find a verdict excessive unless it is so grossly excessive as to shock our sense of justice. (Citations omitted.)

Thompson v. Anthony Crane Rental, Inc., __Pa. Superior Ct. _, 473 A.2d 120, 127 (1984).

Following the above guideline, we can find no grounds for the grant of a new trial based upon the award given Schipske or for a reduction of his verdict.

Robert Schipske testified that he was shot across the bridge of his nose. The bullet cut his nose and singed his eyelashes. (Notes of Testimony, March 5, 1984, pages 79-80.)

He went to the hospital where he received stitches. He testified that "Everything was numb in my face. I didn't know how much of my face was shot away, and that was my first concern." (Notes of Testimony, March 5, 1984, pages 82-83.)

As a result of the shooting, Schipske testified that all of the blood vessels in his eyes were broken. He had bruises on his face for three or four weeks and was in pain for about two to three weeks. He was left with a small scar. (Notes of Testimony, March 5, 1984, page 91.) He also suffered from nightmares for approximately six months after he was injured and experienced embarrassment, apprehension and guilt. (Notes of Testimony, March 5, 1984, pages 92-94.)

Although Schipske's hospital bill was only $132, we do not find the jury's verdict so grossly excessive as to shock our sense of justice, in light of his ordeal as set forth above. Our Superior Court has stated:

> Mere disparity between the amount of the verdict and out-of-pocket expenses is not in itself sufficient grounds to disturb a verdict . . . [O]ur Supreme Court upheld an award of $79,500 although medical expenses

were less than $200. Similarly, we have sustained a verdict of $25,000 although medical expenses totalled only $549.60.

Kravinsky v. Glover, 263 Pa. Superior Ct. 8, 25-26, 396 A.2d 1349 (1979).

Defendants also assert that it was improper for the Court to permit the jury to consider William Abate's hernia operation and moving expenses given his failure to establish the necessary causal connection between them and the incident of January 25. Defendants argue that because neither the hernia operation nor the moving expenses was an obvious, natural or probable result of the shooting incident, expert testimony was required to establish the necessary element of causation.

There is no dispute here that Plaintiff Abate's injuries are the consequence of his being shot while working at the picket site. Dr. Federico Peguero-Olivo, a cardiac and thoracic vascular surgeon, testified that he operated on Abate after he was admitted to the hospital with a gunshot wound of the neck and with the bullet lodged in his chest. (Notes of Testimony, March 6, 1984, pages 205-207.) The Doctor testified that Abate had "a continuous cough which caused a problem for the patient for years." (Notes of Testimony, March 6, 1984, page 216.) A second operation was required to remove the bullet. After the second procedure, Abate still experienced a coughing condition attributed, by Dr. Peguero-Olivo, to "a paralysis of the left vocal cord." (Notes of Testimony, March 6, 1984, page 227.) A third surgical procedure was performed after which Abate continues to suffer with some pain and the coughing problem. (Notes of Testimony, March 6, 1984, page 238.)

In conjunction with the expert medical testimony above, William Abate testified as follows:

Q. Now, did you have a problem with your hernia?

A. Well, I coughed so much that I ripped all the stitches in my hernia, and I had to go back for another operation.

Q. Now, you had a hernia operation prior to the shooting; correct?

A. That's right.

Q. Now, after the shooting, about how long after the shooting did you have recurring problems with your hernia?

A. I would say about four or five months when I started to cough real bad.

Q. As a result of coughing, what happened to your hernia?

A. I ripped all the stitches in my hernia from coughing so much.

Q. What did you have to do?

A. Go back and get operated on again.

(Notes of Testimony, March 5, 1984, page 19.)

Although it may have been wiser on Plaintiffs' part to use expert testimony to establish causation, nevertheless, the medical evidence here that Abate's injury resulted in a chronic cough coupled with Abate's own testimony that his coughing tore his hernia stitches was sufficient for the jury to consider evidence of the second hernia operation.

Furthermore, the jury was properly instructed that Plaintiffs were entitled to be compensated for "all fair and necessary medical expenses which were reasonable [sic] incurred for the diagnosis, treatment and cure of the injuries they sustained *as a result of the Defendants' conduct.*" (Emphasis added.) (Notes of Testimony, March 6, 1984, pages 6-7.)

Defendants' assertion of error concerning evidence of Abate's move to Florida is similarly without merit. Abate testified as follows:

Q. Now, today, what is your condition with regard to physical exertion, walking up and down stairs, walking, doing physical labor?

A. This morning when I came out and felt this cold air, it took my wind right away from me again.

The cold air bothers me an awful lot.

Q. What about walking and doing any kind of physical exercise? How does that affect you?

A. Real bad. Catch my wind away from me and pain all the time.

Q. Now, you have recently sold your home; correct?

A. Yes.

Q. And you intend to move?

A. I will be moving to Florida soon.

Q. Why are you moving to Florida?

A. I just can't keep up. I have got to have people do work around here and I don't want to do that. I bought a home in Florida where I can go into a condominium where I don't have to do no work, take care of my wife.

Q. You sold your home and are moving to a condominium?

A. That's correct.

Q. One of the reasons is the upkeep of the house?

A. That's correct.

Q. What about the weather?

A. The weather down there is warmer and this will protect me a hundred percent.

Q. Are there any other reasons for your moving to Florida?

A. No, sir.

(Notes of Testimony, March 5, 1984, pages 31-32.)

Abate was clearly competent to testify as to the reason for his move and it was for the jury to weigh that testimony. Medical testimony conclusively established Abate's breathing and coughing problems as a result of his injury. The evidence was sufficient for the jury to consider Abate's moving expenses as a compensable incidental expense of the injury.

Defendants next contend that the Court erred in admitting Plaintiffs' medical bills into evidence given the absence of expert medical testimony establishing that such expenses were both reasonable and necessary.

In *Rataj v. Liu*, 215 Pa. Superior Ct. 547, 260 A.2d 484 (1969), the Court considered the narrow question of whether the trial court erred in admitting in evidence exhibits containing a detailed listing of medical tests and treatments given to the plaintiff by doctors or hospitals and a statement of charges therefor when neither the doctors nor representatives from the hospitals were called to testify at the trial.

At the trial the plaintiff testified that he had received all the services indicated on the exhibits and described them in detail. Plaintiff's family physician, the sole medical witness called by the plaintiff, testified that all the charges appearing on the exhibits were reasonable and that all the services rendered were necessitated by the plaintiff's automobile accident. *Rataj v. Liu, supra*, at 549-551.

The Court stated the following:

> The relevance of the exhibits was on the issue of the reasonableness of these medical charges. *Such reasonableness can be determined not only from the direct evidence but also from the character of the injury and of the medical services and treatment as shown by the evidence in the case* ... In proving special medical damages for personal injuries, proof should be offered (1) that the medical services were rendered, (2) what the reasonable charges are therefor, (3) that the services for which they were rendered were necessary, and (4) that they were related to the trauma suffered in the accident. (Emphasis added.) (Citations omitted.)

Rataj v. Liu, supra, at 551.

The Court also stated:

> [A] physician has been held to be qualified generally to testify on the reasonableness of medical charges for services rendered *by other doctors and hospitals*. (Emphasis added.)

. . . .

> A plaintiff cannot testify why medical tests were made . . . However, it has been held that a plaintiff may testify that he received certain services and certain charges for them.

Ratay v. Liu, *supra*, at 553.

There is sufficient evidence in the record before us to substantiate the reasonableness and necessity of Plaintiffs' medical bills. Defendants do not seem to seriously challenge the bills of Plaintiffs Gajkowski and Schipske. Dr. Jane Barton, Gajkowski's treating physician, testified to his course of treatment and to the reasonableness of the expenses he incurred. (Notes of Testimony, March 6, 1984, pages 290-306, 315-318.) Dr. Barton also testified to the reasonableness of Schipske's emergency room charge. (Notes of Testimony, March 6, 1984, page 315.)

Plaintiff Abate testified to the services he received and the charges for such services.

Q. Would you look over that document?

Take your time and I will ask you those questions, Have you reviewed the Exhibit?

A. Yes, sir.

Q. Okay. Now, with regard to the first two columns of the Exhibit, do you recall making all of those doctors or hospital visits, at least on every page up to page five? Do you recall making --

A. Yes, I have.

Q. Do you remember making them at or around the dates that are indicated under the column "date of care?"

A. Yes.

Q. Okay, and the periods under "date of care" that had a longer period of time where you were in the hospital, do you remember being in the hospital during those days?

A. Yes, I have.

. . . .

Q. Under the third column, "date of invoice," do you recall receiving doctors' bills or hospital bills at or around those dates for those visits?

A. Yes, I have.

Q. And the last column, do you recall that those bills were about the approximate amounts which are stated on that document?

A. Yes.

Q. Okay, and do you recall those bills being paid in those amounts?

A. Yes, I have.

(Notes of Testimony, March 5, 1984, pages 37-39.)

Dr. Peguero-Olivo gave extensive testimony on Abate's condition, his course of treatment and the reasons for the various procedures that were performed. The Doctor also testified that he sent Abate to various other specialists and explained the reasons why it was necessary for Abate to consult them. (Notes of Testimony, March 6, 1984, pages 206-239.) He testified in part as follows:

Q. Will you tell the Jury, please, what you mean when you say you had to resection the carotid artery?

A. When you have a bullet injury of a vessel, an artery, the damage is so much that you should clean, remove that tissue.

Now, we saw that that tissue was already damaged, and it was causing what is called an aneurysm which is a weak spot in the artery. If we leave it there, it will form a clot inside and the flow going to the brain --and can eventually break and can cause a paralysis of the one side of the body through the circulation of that side.

Q. Is that what we commonly understand as a stroke?

A. Yes, stroke. You can get a stroke from as a consequence of this. So what we have to repair the artery and the best way to do it is to clamp that artery, take out a piece of that damaged artery, then patch it with a vein which we did.

(Notes of Testimony, March 6, 1984, pages 212-213.)

Q. After that initial hospitalization, Doctor, did you again see Mr. Abate?

A. Yes, I saw Mr. Abate--do you have the other x-ray? Because we had to send him to a specialist, because his vocal cord was, the left side was paralyzed, and this was permanent damage, so it had to be taken care of by an ear, nose and throat doctor, an E.E.N.T. doctor and I understand he was taken care of . . . .

(Notes of Testimony, March 6, 1984, page 216.)

Finally, Dr. Barton testified, based on hypotheticals put to her, to the reasonableness of Abate's medical expenses. (Notes of Testimony, March 6, 1984, pages 318-328.) Dr. Barton is a Board Certified opthomologist who is on the teaching staff of Wills Eye Hospital and who has served in the past in both hospital emergency and operating rooms. (Notes of Testimony, March 6, 1984, pages 291, 314.) As such, she was qualified to attest to the reasonableness of Abate's medical bills. As stated in *Rataj*, a physician may testify on the reasonableness of medical charges for services rendered by other doctors and hospitals.

In light of the above, we find that the necessity and reasonableness of Plaintiffs' medical expenses were established beyond dispute and were properly before the jury.

DELAY DAMAGES

The final issue before us is that of delay damages. Rule 238 provides for the awarding of delay damages in an action for bodily injury and reads in relevant part:

(a) Except as provided in subdivision (e), in an action seeking monetary relief for bodily injury, death or property damage, or any combination thereof, the court . . . shall

(1) add to the amount of compensatory damages in the award of the arbitrators, in the verdict of a jury, or in the court's decision in a nonjury trial, damages for delay at ten (10) percent per annum, not compounded, which shall become part of the award, verdict or decision;

(2) compute the damages for delay from the date the plaintiff filed the initial complaint in the action or from a date one year after the accrual of the cause of action, whichever is later, up to the date of the award, verdict or decision.

Pa. R.C.P. No. 238, 42 Pa. C.S.A.

Based upon the above, we find that Plaintiffs are entitled to delay damages for the period from January 25, 1981, the date one year after the accrual of the cause of action, to March 7, 1984, the date of the damages verdict. Having found that the negligence standard applies, the awards to Ronald and Frances Gajkowski and Robert Schipske shall be reduced by 20%, before delay damages are calculated, as the jury found these Plaintiffs to be 20% comparatively negligent.

ORDER

AND NOW, this 5th day of September, 1984, Defendants' Motions In Arrest of Judgment, or in the alternative for Judgment Non Obstante Veredicto, or in the alternative, for a New Trial are hereby denied.

The verdict shall be molded as follows:

William Abate	$709,131.88
Jean Abate	$131,150.80
Ronald Gajkowski	$618,989.42
Frances Gajkowski	$65,575.40
Robert Schipske	$12,590.46

By the Court,
/s/ Kenneth G. Biehn, J.

Judge Kelton did not participate.

[Appealed to the Superior Court.]

Supreme Court, U
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No. 88-1440

IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

RONALD and FRANCES GAJKOWSKI, ROBERT SCHIPSKE and WILLIAM and JEAN ABATE,
Petitioners

v.

HIGHWAY TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 107,
Respondent

On Petition for Writ of Certiorari to the Pennsylvania Supreme Court

---

BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTION PRESENTED

Whether there could be any deprivation of property without due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States merely because the Pennsylvania Supreme Court exercised its express and inherent authority to reconsider and subsequently withdraw a prior opinion particularly where the facts demonstrate that Petitioners never had a final judgment under Pennsylvania law?

TABLE OF CONTENTS

	Page
COUNTER-STATEMENT OF QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
CONSTITUTIONAL AND STATUTORY PROVISIONS	1
COUNTER-STATEMENT OF THE CASE	3
REASONS WHY THE PETITION SHOULD BE DENIED	7
I. This Court Has Long Recognized That A Litigant Is Not Deprived Of Due Process Where A Court Has Exercised Its Inherent Power To Reopen Even A Final Judgment	7
II. The Pennsylvania Supreme Court's Conclusion That It Had The Power Under The Pennsylvania Rules Of Appellate Procedure To Withdraw The Opinion Of August 31, 1987 Is Binding Upon This Court For Purposes Of Determining The Existence Of A Property Interest Under The Due Process Clause	9
III. The Pennsylvania Supreme Court's Decision Was Correct As A Matter Of State Law	14
CONCLUSION	18

TABLE OF AUTHORITIES

CASES Page

American Iron and Steel Institute v. E.P.A., 560 F.2d 589 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978) 8
American Tool Bridge Co. v. Railroad Comm., 307 U.S. 486 (1939) 7
Anderson National Bank v. Luckett, 321 U.S. 233 (1944) 9
Bishop v. Wood, 426 U.S. 341 (1976) 9, 10, 11, 12
Cohen v. Beneficial Loan Corp., 337 U.S. 541 (1949) 8
Commonwealth v. Ballard, 292 Pa. Super. 129, 436 A.2d 1039 (1981) 12
Commonwealth v. Blair, 470 Pa. 598, 369 A.2d 1153 (1977) 17
Commonwealth v. Brady, 37 D. & C. 3d 359 (Northumberland Cty. 1985) 12
Commonwealth v. Swanger, 453 Pa. 107, 307 A.2d 875 (1973) 17
In re, Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1076 (1988) 14
Dozor v. Rosenberg, 431 Pa. 321, 246 A.2d 330 (1968) 16, 17
In re Estate of Ciaffoni, 498 Pa. 267, 446 A.2d 225, *cert. denied*, 459 U.S. 1036 (1982) 15, 16
Evans v. Chicago, 689 F.2d 1286 (7th Cir. 1982) .. 14
Gajkowski v. International Brotherhood of Teamsters, —— Pa. ——, 548 A.2d 533 (1988), *withdrawing*, 515 Pa. 516, 530 A.2d 853 (1987) 6, 7
Greyhound Food Management v. City of Dayton, 653 F. Supp. 1207 (S.D. Oh. 1986), *aff'd and remanded*, 852 F.2d 866 (6th Cir. 1988) 14
Hammond v. United States, 786 F.2d 8 (1st Cir. 1986) 14
Iowa Central Ry. v. Iowa, 160 U.S. 389 (1896) 8
Ladner v. Siegel, 298 Pa. 487, 148 A. 699 (1930) .. 13
Neblett v. Carpenter, 305 U.S. 297 (1938) 8

TABLE OF AUTHORITIES—Continued

	Page
Pennsylvania Co. v. Scott, 346 Pa. 13, 29 A.2d 328 (1942)	13, 14
Pennzoil Co. v. Texaco, 481 U.S. 1 (1987)	11
Philadelphia Marine Trade Association v. National Longshoremen's Association, 453 Pa. 43, 308 A.2d 98 (1973)	7
Simon v. Craft, 182 U S. 427 (1901)	8
Star v. Bradford, 2 P. & W. 384 (Pa. 1831)	12
Thompson v. Louisville, 362 U.S. 199 (1960)	12
Tidal Oil Co. v. Flanagan, 263 U.S. 444 (1924)	7
Tradesmen's National Bank v. Floyd, 156 Pa. Super. 141, 39 A.2d 728 (1944)	13
CONSTITUTIONAL PROVISIONS	
U.S. Constitution, Amendment XIV	*passim*
Constitution of the Commonwealth of Pennsylvania, Article I, § 11	1, 2, 8, 9
STATUTES	
Bankruptcy Code, 11 U.S.C. § 362(a)	6
Pennsylvania Judicial Code, 42 Pa.C.S.A. § 726	2, 9
Pennsylvania Labor Anti-Injunction Act 42 P.S. § 206h	6, 7
Norris-LaGuardia Act 29 U.S.C. §§ 101-115	7
RULES	
Federal Rules of Civil Procedure Rule 60	8
Pennsylvania Rules of Appellate Procedure Rule 105	*passim*
Rule 2542	5
Pennsylvania Rules of Civil Procedure Rule 126	9
Rule 128	2, 11
Rule 238	4

TABLE OF AUTHORITIES—Continued

MISCELLANEOUS

Page

7 Am. Jur. 2d *Audita Querela* (1980) 8
18 Am. Jur. 2d *Coram Nobis and Allied Statutory Remedies* (1985) 8
46 Am. Jur. 2d *Judgments* §§ 792-882 (1969) 8

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-1440

RONALD and FRANCES GAJKOWSKI, ROBERT SCHIPSKE and WILLIAM and JEAN ABATE,

Petitioners

v.

HIGHWAY TRUCK DRIVERS AND HELPERS LOCAL UNION NO. 107,

Respondent

On Petition for Writ of Certiorari to the Pennsylvania Supreme Court

---

BRIEF IN OPPOSITION

CONSTITUTIONAL AND STATUTORY PROVISIONS

Pennsylvania Constitution, Article I, § 11:

> Sec. 11. Courts to be open; suits against the Commonwealth
>
> All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or

delay. Suits may be brought against the Commonwealth in such manner, in such courts and in such cases as the Legislature may by law direct.

Pennsylvania Judicial Code, 42 Pa.C.S.A. § 726:

Extraordinary jurisdiction

Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or district justice of this Commonwealth involving an issue of immediate public importance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done.

Rule 105, Pennsylvania Rules of Appellate Procedure:

(a) Liberal Construction and Modification of Rules. These rules shall be liberally construed to secure the just, speedy and inexpensive determination of every matter to which they are applicable. In the interest of expediting decision, or for other good cause shown, an appellate court may, except as otherwise provided in Subdivision (b) of this rule, disregard the requirements or provisions of any of these rules in a particular case on application of a party or on its own motion and may order proceedings in accordance with its direction.

(b) Enlargement of Time. An appellate court for good cause shown may upon application enlarge the time prescribed by these rules or by its order for doing any act, or may permit an act to be done after the expiration of such time; but the court may not enlarge the time for filing a notice of appeal, a petition for allowance of appeal, a petition for permission to appeal, or a petition for review.

Rule 128, Pennsylvania Rules of Civil Procedure:

In ascertaining the intention of the Supreme Court in the promulgation of a rule, the courts may be guided by the following presumptions among others:

(a) That the Supreme Court does not intend a result that is absurd, impossible of execution or unreasonable;

(b) That the Supreme Court intends the entire rule or chapter of rules to be effective and certain;

(c) That the Supreme Court does not intend to violate the Constitution of the United States or of this Commonwealth;

(d) That if the Supreme Court has construed the language used in a rule or statute, the Supreme Court in promulgating a rule on the same subject matter which employs the same language intends the same construction to be placed upon such language;

(e) That the Supreme Court intends to favor the public interest as against any private interest;

(f) That no rule shall be construed to confer a right to trial by jury where such right does not otherwise exist.

COUNTER-STATEMENT OF THE CASE

On November 19, 1979, approximately 500 employees of Minnesota Mining and Manufacturing Company in Bristol, Pennsylvania, who were represented for purposes of collective bargaining by Respondent, commenced a lawful, economic strike against their employer. For the next ten weeks, these employees continuously maintained a peaceful picket line at 3M's facility for 24 hours a day, seven days a week. In the evening of January 25, 1980, this peace was broken suddenly and without warning when one of Respondent's rank and file members shot two fellow members (Gajkowski and Schipske), as well as a 3M security guard (Abate), all of whom then happened to be congregated at or near the picketing site.

Three Complaints in Trespass were filed in June, 1980 in the Court of Common Pleas of Bucks County, Pennsylvania against two labor organizations—the Respondent and the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America. In those actions, which were later consolidated, money damages were sought to redress personal injuries sustained by three of the Petitioners. Actions were also filed by the spouses of two of the Petitioners for asserted losses of consortium. Their claims were tried to a jury which returned a verdict finding Respondent and the IBT jointly and severally liable to Petitioners and awarding damages aggregating $1.3 Million.[1]

Thereafter, timely post-trial motions were filed by the Respondent and the IBT seeking judgment notwithstanding the verdict or, in the alternative, for arrest of judgment, or in the alternative, for a new trial. By Opinion and Order dated September 5, 1984, a three judge panel of the trial court denied the post-trial motions and molded the jury verdicts to reflect the findings of comparative negligence and an award of delay damages[2] for a total judgment of $1,537,437.96.

Both the IBT and Respondent filed timely appeals to the Superior Court of Pennsylvania on September 25, 1984. That court, on January 28, 1986 issued an Opinion and Order reversing the trial court and entering judgments N.O.V. in favor of both the IBT and Respondent.

Thereafter, Petitioners filed a Petition for Allowance of Appeal with the Pennsylvania Supreme Court which was ultimately granted in October, 1986. After the mat-

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[1] Petitioners Ronald Gajkowski and Robert Schipske were found to be 20% comparatively negligent and their verdicts were reduced accordingly.

[2] Delay damages were awarded pursuant to Rule 238 of the Pennsylvania Rules of Civil Procedure in effect at that time.

ter was briefed and argued before the Pennsylvania Supreme Court, that court, on August 31, 1987 issued a Judgment and Opinion reversing, by a four-three vote, the Superior Court's ruling as to Respondent, but affirmed as to the IBT. Respondent then filed an Application for Reargument Pursuant to Rule 2542 of the Pennsylvania Rules of Appellate Procedure which was denied by the Pennsylvania Supreme Court on October 9, 1987. Notification of the denial of reargument was issued by the Prothonotary on October 14, 1987, but was mailed to Respondent's counsel at an improper address. Respondent did not learn of the denial of the reargument application until several days later.

On October 16, 1987, Respondent filed a voluntary petition under Chapter 11 of the Bankrupcty Code with the United States Bankruptcy Court for the Eastern District of Pennsylvania. On October 22, 1987, a Suggestion of Bankruptcy was filed with the Pennsylvania Supreme Court.

While the record remained with the Pennsylvania Supreme Court, and thus the pendency of the matter continued in that court, Respondent petitioned that court to modify its judgment to remand the matter to the Pennsylvania Superior Court to adjudicate issues raised by Respondent on appeal, but never reached by either the Pennsylvania Superior or Supreme Courts. Further, and in order to preserve its appellate rights within the state judicial system, on November 2, 1987, Respondent filed an application styled "Application for Reconsideration Nunc Pro Tunc of the Denial of Application of Appellee Highway Truck Drivers and Helpers Local 107 for Reargument." The latter application was granted on November 18, 1987 by the Pennsylvania Supreme Court, which by separate Order of the same date, denied the Application for Modification of Judgment as "moot." Reargument of the matter was scheduled for April 12, 1988.

Given an unintentional and inadvertent violation of the automatic stay provisions of 11 U.S.C. § 362(a), Respondent sought relief, *nunc pro tunc*, through the Bankruptcy Court from the automatic stay in order to proceed with the reargument before the Pennsylvania Supreme Court. On March 29, 1988, the Bankruptcy Court ruled that the automatic stay rendered null and void Respondent's "Application for Reconsideration *Nunc Pro Tunc*." However, the court lifted the automatic stay prospectively as to both Respondent and Petitioners.

To cure its unintentional violation of the automatic stay, Respondent filed an amended application styled "Amended Application for Reconsideration Nunc Pro Tunc of Denial of Application of Appellee Highway Truck Drivers and Helpers Local Union No. 107 for Reargument Prepared In Accordance With The March 29, 1988 Order of the Honorable Bruce Fox, U.S. Bankruptcy Court for the Eastern District of Pennsylvania." The Pennsylvania Supreme Court granted the amended application on April 7 and confirmed that the reargument would go forward as scheduled on April 12, 1988.

On September 28, 1988, the Pennsylvania Supreme Court announced its decision in the case of *Gajkowski v. International Brotherhood of Teamsters*, —— Pa. ——, 548 A.2d 533 (1988). Justice Papadakos, who had been a member of the four-three majority which originally reversed the Pennsylvania Superior Court and reinstated the jury award as against Respondent, wrote for a new four-three majority of the Court withdrawing that Court's first Opinion reported at 515 Pa. 516, 530 A.2d 853 (1987). In its September 28, 1988 decision, and after giving a detailed explanation of the authority upon which it could review the matter, the majority of the Pennsylvania Supreme Court determined that the court's prior Opinion ". . . was in effect a repudiation of legislative intent and a removal of the limited liability which the Pennsylvania Labor Anti-Injunction Act [43 P.S. § 206h]

was intended to cloak labor unions with in furtherance of the legislative policy of protecting the labor movement." 548 A.2d at 534.[3] The majority concluded that the court had unintentionally and inadvertently employed doctrines of *respondeat superior* and vicarious liability in a situation where the Pennsylvania Legislature had expressly forbidden their application. It was this "blatant error" that caused the court to take ". . . the extraordinary step . . . of granting the Application for Reconsideration *Nunc Pro Tunc* as well as the Amended Application *Nunc Pro Tunc*." 548 A.2d at 541.

Petitioners thereafter filed an Application for Reconsideration and Reargument of the September 28, 1988 Opinion and Order of the Pennsylvania Supreme Court. That Application was denied by that court on December 1, 1988. Petitioners now seek a writ of certiorari to review the Order of the Pennsylvania Supreme Court. Respondent opposes Petitioner's Application.

REASONS WHY THE PETITION SHOULD BE DENIED

I. This Court Has Long Recognized That A Litigant Is Not Deprived Of Due Process Where A Court Has Exercised Its Inherent Power To Reopen Even A Final Judgment.

This Court has long held that the Due Process clause of the Fourteenth Amendment does not grant to a litigant any vested right to a particular rule of procedure, *American Tool Bridge Co. v. Railroad Comm.*, 307 U.S. 486 (1938), or judicial decision, *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450 (1924). The Due Process clause only

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[3] Section 8 of the Pennsylvania Labor Anti-Injunction Act, 42 P.S. § 206h, sets forth a standard of limited liability of labor organizations and employer associations for unlawful acts of their officers, agents or members occurring during the course of a labor dispute. It was patterned after the federal Norris-LaGuardia Act, 29 U.S.C. §§ 101-115. *Philadelphia Marine Trade Association v. National Longshoremen's Association*, 453 Pa. 43, 308 A.2d 98 (1973).

assures notice and an opportunity to argue the merits under procedures established by a state and its courts. *Simon v. Craft*, 182 U.S. 427, 436 (1901).

Nor does the Federal Constitution regulate the details, variance or error in the application of state rules. *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 547 (1949); *Neblett v. Carpenter*, 305 U.S. 297, 302 (1938). Indeed, in *Iowa Central Ry. v. Iowa*, 160 U.S. 389 (1896), this Court specifically rejected an attempt to regulate a state court's use of summary procedures through the Due Process clause.

The basic rights of notice and hearing on the merits indisputably had been provided by the Pennsylvania Supreme Court to the Petitioners in the matter now before this Court. Petitioners do not claim that they had no notice or opportunity to argue the merits before that court. The absence of such a deprivation defeats Petitioners' claim.

Further, the right of a court to reopen even a final judgment for cause is ancient and inherent. It existed in the common law writs of *coram nobis* and *audita querela*, both of which were extant at the time the Due Process clause was written. *See generally* 7 Am. Jur. 2d *Audita Querela* (1980); 18 Am. Jur. 2d *Coram Nobis and Allied Statutory Remedies* (1985); and 46 Am. Jur. 2d *Judgments* §§ 792-882 (1969) (esp. § 811 *Mistakes*).

The practice exists today in the federal system under the Federal Rules of Civil Procedure. *See* Rule 60, Federal Rules of Civil Procedure and accompanying notes. *See also American Iron and Steel Institute v. E.P.A.*, 560 F.2d 589, 592-600 (3d Cir. 1977), *cert. denied*, 435 U.S. 914 (1978) (court of appeals had the power to recall its mandate two years after its issuance).

The procedure exists as well in Pennsylvania. Article I, § 11 of the Pennsylvania Constitution contains an "open courts" provision which guarantees that each

litigant shall have access to the courts to pursue every appropriate "remedy by due course of law" and to insure that "right and justice [are] administered without sale, denial or delay." The Pennsylvania Legislature implemented this constitutional provision by its passage of the Pennsylvania Judicial Code, 42 Pa. C.S.A. § 726. Therein, the Pennsylvania Supreme Court is empowered to assume plenary jurisdiction over any matter pending before any court or district justice of the Commonwealth of Pennsylvania and enter any appropriate order. The intent of these constitutional and statutory provisions is further codified within the rules of procedure governing Pennsylvania courts. *See e.g.*, Rule 105, Pennsylvania Rules of Appellate Procedure and Rule 126, Pennsylvania Rules of Civil Procedure. The traditional and customary nature of these procedures is sufficient to quiet due process objections. *Anderson National Bank v. Luckett*, 321 U.S. 233, 244 (1944).

II. The Pennsylvania Supreme Court's Conclusion That It Had The Power Under The Pennsylvania Rules Of Appellate Procedure To Withdraw The Opinion Of August 31, 1987 Is Binding Upon This Court For Purposes Of Determining The Existence Of A Property Interest Under The Due Process Clause.

In *Bishop v. Wood*, 426 U.S. 341 (1976), this Court set forth the basis upon which it would determine whether a state statute or a similar legal provision created a property interest protected by the Fourteenth Amendment. The Plaintiff in *Bishop* was a municipal police officer who had been discharged without a hearing. He maintained that his termination violated the Fourteenth Amendment by depriving him of a property interest in continued employment which allegedly arose from a particular municipal ordinance. According to the *Bishop* plaintiff, this ordinance gave him a justifiable expectation that he could not be discharged for any reason other than those specifically set forth in the ordinance.

He further reasoned that his justifiable expectation constituted "property" which could not be divested absent due process. This Court disagreed.

Writing for the Court, Justice Stevens began with the proposition that "the sufficiency of the claim of entitlement must be decided by reference to state law." 426 U.S. at 344. Justice Stevens conceded that "[o]n its face, the ordinance on which [plaintiff] relies may fairly be read as conferring such a guarantee [of continued employment]." This Court, however, would not act upon a facial reading of the ordinance, but rather looked to governing judicial authority. Significantly, Justice Stevens observed that, "[w]e do not have any authoritative interpretation of this ordinance by a North Carolina state court." 426 U.S. at 341. In the absence of such an "authoritative" construction, this Court relied upon the interpretation of the lower federal courts, which were more familiar with North Carolina law. The lower courts had found that the ordinance had not created a property interest. Deferring to this conclusion, Justice Stevens held that the plaintiff's discharge did not trigger the protections of due process. 426 U.S. at 345-47.

Bishop demonstrates that the due process implications of a state statute or similar legal enactment cannot be judged merely upon its face. Rather, this Court must look to the existing state judicial interpretations. Furthermore, an "authoritative interpretation" issued by a state court of last resort is conclusive on the issue of whether the enactment creates a property interest.

In the matter now before the Court, the very act of the Pennsylvania Supreme Court which withdrew what it conceded to be the erroneous Opinion of August 31, 1987 and which ruled in favor of Respondent constituted an "authoritative interpretation" of the Pennsylvania Rules of Appellate Procedure. This interpretation conclusively established that, under Pennsylvania law, the Petitioners never had a final judgment. The absence of a final judg-

ment, in turn, necessarily establishes the absence of a property interest and, thus, discredits the entire due process argument.

To reach a contrary conclusion, this Court would have to overturn the Pennsylvania Supreme Court's interpretation of its own procedural rules. Such a result would flout not only *Bishop*, but also the more recent decision by this Court in *Pennzoil Co. v. Texaco*, 481 U.S. 1 (1987).

Pennzoil considered whether a Texas rule of procedure violated the Due Process clause by requiring the posting of an excessively large bond. There were no clear precedents as to whether a Texas court might cure the potential constitutional problem by waiving the bonding requirement in the case where the appellant lacked the money to secure a bond. The lower federal courts found that no such exception could be recognized by the Texas courts, because the governing rule of civil procedure ". . . lists no exceptions to requirement that an appellant file a bond to suspend execution of a money judgment pending appeal." 481 U.S. at 16 n.15. In reversing, this Court admonished that federal judges "cannot assume that the Texas courts would not refuse to construe the rule, or to apply their inherent powers" in a manner which would prevent an unconstitutional result. *Id.*

Pennzoil is fatal to the Petitioners' claims. The case establishes that federal judges must permit state courts to conclusively interpret their own procedural rules, and must recognize that state courts have "inherent" powers to interpret those rules in ways that go beyond the mere text of the rules. A major purpose of this deference is to allow state courts to interpret their own laws in a way to avoid constitutional problems.[4] In accordance with this principle, this Court should accept the Pennsylvania Supreme Court's construction of its own rule.

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[4] See Rule 128, Pennsylvania Rules of Civil Procedure.

Page six of the Petition cites several cases for the proposition that "[s]tate court decisions may violate substantive due process . . ." in some situations. None of these cases undermines the conclusion that the Pennsylvania Supreme Court's interpretation of its own rules is final and binding for purposes of due process analysis.

Both long standing Pennsylvania Supreme Court precedent and the Pennsylvania Rules of Appellate Procedure clearly establish that no final judgment had been rendered by the Pennsylvania Supreme Court when that court acted upon Respondent's Application for Reconsideration *Nunc Pro Tunc* or its Amended Application for Reconsideration *Nunc Pro Tunc*. The Pennsylvania Supreme Court has held that an appellate judgment is not "final" as long as the record remains in the Supreme Court. *Star v. Bradford*, 2 P. & W. 384, 398 (Pa. 1831) ("[A]s long as it remains in the Supreme Court, the action is still pending.")[5] Here, the record remained in the Pennsylvania Supreme Court at the time the August 31, 1987 "judgment" was vacated and withdrawn. The record was not remanded by the Pennsylvania Supreme Court until January 12, 1989.

Thompson v. Louisville, 362 U.S. 199 (1960) is not even arguably relevant. In *Thompson*, this Court reversed a criminal conviction for lack of evidence. The case did not deal with whether state law creates a property interest.

Moreover, Petitioners readily admit that their remaining citations are dicta in very old cases. All of these decisions pre-date *Bishop v. Wood*, *supra* and, thus, are

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[5] Despite the age of the *Star* decision, the principle announced in that case retains vitality in more recent Pennsylvania cases. *See, e.g., Commonwealth v. Ballard*, 292 Pa. Super. 129, 436 A.2d 1039 (1981) (computation of time period for purposes of speedy trial rules commences from date of remand of record by appellate court to trial court); *Commonwealth v. Brady*, 37 D. & C. 3d 359 (Northumberland Cty. 1985) (same).

not persuasive to the extent that they suggest anything to the contrary.

Finally, on pages 4-5 of the Petition, Petitioners cite several Pennsylvania and federal cases for the proposition that the Pennsylvania Supreme Court could not reverse its original judgment against Respondent. Each of these cases are easily distinguishable.

In *Ladner v. Siegel*, 298 Pa. 487, 148 A. 699 (1930), the plaintiffs challenged a state court's decision to modify an existing injunction which the plaintiffs had previously obtained. The plaintiffs argued that the judgment granting the injunction constituted property which could not be taken from them under the Fourteenth Amendment. The Pennsylvania Supreme Court disagreed, reasoning that the plaintiffs had no "vested" property right in the continuation of the injunction because, under state law, state courts have the power to modify that judgment. 298 Pa. 498-500, 148 A. at 703-04. *Ladner* is fully consistent with the matter now before the Court, where the Pennsylvania Supreme Court has found that the August 31, 1987 judgment could be reconsidered under state law and the court's procedures.

Tradesmen's National Bank v. Floyd, 156 Pa. Super. 141, 39 A.2d 728 (1944), merely involved a situation where the Superior Court affirmed a trial court's refusal to re-open a judgment, noting that the "equities of the case" prevented such a result. 156 Pa. Super. at 151, 39 A.2d at 733. *Floyd*, moreover, long predates Rule 105(a) of the Pennsylvania Rules of Appellate Procedure —the rule of appellate procedure which authorized the Pennsylvania Supreme Court to reconsider the present case. *Floyd* is simply irrelevant to the Pennsylvania Supreme Court's right to recall a judgment in this situation.

Pennsylvania Co. v. Scott, 346 Pa. 13, 29 A.2d 328 (1942) is another inapposite citation. That case upheld

the constitutionality of the Pennsylvania Deficiency Judgment Act. *Scott* does not question a state court's right to reconsider a judgment and does not involve facts bearing any similarity to those in the matter now under consideration.

The federal authorities cited by Petitioners are similarly irrelevant and unpersuasive. *Evans v. Chicago*, 689 F.2d 1286 (7th Cir. 1982) held that a municipal government could not impair the value of state court judgments through late payment. It was undisputed that the judgments were final under state law, and the defendants never argued that the municipal government had any power under state law to change the judgments. *Evans*, therefore, has no application here where the state's highest court has held that the judgment in question was not final under state law.

The remaining federal citations, which concern the right of Congress and state legislatures to modify the scope of legal remedies, are specious for the same reason. *In re Consolidated United States Atmospheric Testing Litigation*, 820 F.2d 982 (9th Cir. 1987), *cert. denied*, 108 S.Ct. 1076 (1988); *Hammond v. United States*, 786 F.2d 8 (1st Cir. 1986); *Greyhound Food Management v. City of Dayton*, 653 F.Supp. 1207 (S.D. Oh. 1986), *aff'd and remanded*, 852 F.2d 866 (6th Cir. 1988).

III. The Pennsylvania Supreme Court's Decision Was Correct As A Matter Of State Law.

In withdrawing its original ruling, the Pennsylvania Supreme Court was careful to deliniate and discuss in detail both the authority and factual basis for its decision. It acted pursuant to Rule 105(a) of the Pennsylvania Rules of Appellate Procedure. That section must be read in conjunction with Rule 105(b), which is incorporated by reference.

The plain language of 105(a) empowers the Pennsylvania Supreme Court to modify *all* Rules of Appellate

Procedure except for those specifically excluded by subsection (b). The reconsideration extended to Respondent in this case by the Pennsylvania Supreme Court had nothing to do with procedures in subsection (b), as the recall of the original Opinion did not enlarge the time for filing a "notice of appeal, a petition for allowance of appeal, a petition for permission to appeal, or a petition for review." Therefore, Rule 105(a) explicitly authorized the Pennsylvania Supreme Court's action and the Petitioners have no basis for claiming a "property interest" in a contrary result.

The Pennsylvania Supreme Court's Opinion which ruled in favor of Respondent cited several precedents for the proposition that 105(a) sanctioned the decision to grant reargument. Petitioners argue that all of these cases are irrelevant (Petition, p. 6 n. 5). Their attempt to distinguish these cases misses the point. Petitioners are attempting to establish that the Pennsylvania Supreme Court lacks the *power* to apply the broad discretion authorized by Rule 105 in the manner that it was implemented. To prevail upon such an argument, Petitioners must be required to present convincing authority for narrowing the open-ended language of Rule 105. No such authority has been presented—only Petitioners' bare assertion that the Pennsylvania Supreme Court's action was "arbitrary." It is most respectfully submitted that this Court should not disturb the Pennsylvania Supreme Court's decision.

Furthermore, the cases cited by the Pennsylvania Supreme Court fully support its prerogative to withdraw the original judgment against the Respondents. *In re Estate of Ciaffoni*, 498 Pa. 267, 446 A.2d 225, *cert. denied*, 459 U.S. 1036 (1982) is directly on point. *Ciaffoni* involved the challenge to a ruling of an orphans' court which upheld the validity of a probated will. The appellants argued that the orphans' court had erred by excluding evidence of fraud. The Pennsylvania Supreme

Court affirmed and subsequently denied reargument. Under Petitioners' theory, the litigation should have ended at that time.

The *Ciaffoni* appellants, however, moved for a new trial, and, when their motion was denied, filed a new appeal. The Pennsylvania Supreme Court accepted jurisdiction, explaining that "[w]e shall treat this matter as an application pursuant to Pa. R.A.P. 105(a) for modification of the Rules of Appellate Procedure to allow a second application for reargument." 498 Pa. at 269, 446 A.2d at 225. Upon reviewing the record, the *Ciaffoni* court stated that it was "convinced that the excluded wills were properly offered in support of appellants' claim that the pages of the challenged will had been fraudulently substituted." 498 Pa. at 270, 446 A.2d at 226. The court thereupon vacated its original order affirming the decree of the orphans' court, vacated the decree of the orphans' court and remanded the record for proceedings consistent with that opinion.

Petitioners attempt to distinguish *Ciaffoni* on the theory that the "case did not involve, as does this one, a final judgment at law for money damages, and the Court emphasized that there has, as yet, been no final distribution pursuant to the probated will." (Petition, pp. 6-7 n. 5). This logic is specious. The Pennsylvania Rules of Appellate Procedure draw no distinction between the finality of a "judgment at law for money damages" and a judgment in favor of a successful defendant in equity. However, as it is construed, *Ciaffoni* graphically demonstrates that Rule 105(a) of the Pennsylvania Rules of Appellate Procedure grants to the state court the discretion to reconsider an ostensibly "final" judgment. As a consequence, Petitioners have no "property interest" under state law which was divested in this case.

Petitioners also misinterpret *Dozor v. Rosenberg*, 431 Pa. 321, 246 A.2d 330 (1968). There, the plaintiffs originally obtained a judgment from a court of common

pleas which consisted of both an injunction and an award of monetary damages. In a ruling issued on March 22, 1966, the Pennsylvania Supreme Court affirmed the injunction, but ordered a new trial on damages. A petition for reargument was denied. "Sometime thereafter," the Pennsylvania Supreme Court *sua sponte* ordered reargument on the issue of damages, overturned its previous determination, and affirmed the lower court's damage award. 431 Pa. at 323, 246 A.2d at 331.

Petitioners claim that *Dozor* is distinguishable, because "[b]y granting reargument, the Court merely finalized the judgment which would otherwise have still been open." (Petition, pp. 6-7 n. 5). The meaning of this contention is, at best, unclear. In any event, *Dozor* offers additional authority demonstrating that the Pennsylvania Supreme Court possesses the power under state law to reverse prior determinations, even when the normal time for seeking reargument has expired. Moreover, *Dozor* totally discredits the contention that the Petitioners have been deprived of rights under state law.

Finally, Petitioners assert that "[t]wo of [the cases cited by the Pennsylvania Supreme Court] were criminal cases, decided in favor of the defendant, which are irrelevant to this case since no property right of the Commonwealth was infringed. *Commonwealth v. Swanger*, 453 Pa. 107, 307 A.2d 875 (1973); *Commonwealth v. Blair*, 470 Pa. 598, 369 A.2d 1153 (1977)." (Petition, p. 6 n. 5). This rationale fails for two reasons.

First, in *Swanger*, the Pennsylvania Supreme Court granted an untimely motion to reargue an opinion which had been issued in favor of the *defendant*. Therefore, the case adds further support for the conclusion that, under Pennsylvania law, a private litigant's "property interest" in a judgment is subject to the Supreme Court's right to order reargument, albeit at a time after the ordinary deadline for review has expired. Second, the entire question of whether the Commonwealth has a "property in-

terest" is a *non-sequitor* because Pennsylvania appellate procedure has never distinguished the Commonwealth from private litigants for purposes of determining the finality of judgments.

As explained earlier, Pennsylvania Courts have historically enjoyed the right to order the type of reargument that was ordered here. Consequently, Petitioners have no basis for challenging the Pennsylvania Supreme Court's "power" to act as it did in this case.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari to the Pennsylvania Supreme Court should be denied.

Respectfully submitted,

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